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No.

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In The
Supreme Court of the United States
October Term, 1989

RALPH J. ZOLA,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does an agency order which only revokes the license of a corporation, containing no restraints, have the effect of restraining future conduct of a person in control of the corporation, where that person was not charged in, or made party to, the revocation proceeding nor named in the order?

2. Does the Interstate Commerce Commission have express or implied power to bar a non-licensee from transportation activities under its investigative jurisdiction?

PARTIES TO THE PROCEEDING IN THE COURT BELOW

Petitioners: Ralph J. Zola, North American Transport Co., Inc., and Auto Caravan Corp.

Respondents: Interstate Commerce Commission and The United States of America.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Ralph J. Zola, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit.

OPINION BELOW

See Appendix pages A-1 through A-27, (reported at 889 F.2d 508 (3d Cir. 1989)

STATEMENT OF THE COURT'S JURISDICTION

This Court has jurisdiction pursuant to 28 U.S. Code Sec. 1254. The date of entry of judgment below was November 16, 1989. The date of order denying rehearing was December 18, 1989.

STATUTES INVOLVED

The following statutes are cited and relied upon:

49 U.S. Code Sec. 10321;

49 U.S. Code Sec. 10925;

49 U.S. Code Sec. 10934;

49 U.S. Code Sec. 11701;

49 U.S. Code Sec. 11702;

49 U.S. Code Sec. 11703.

The pertinent text of the statutes is found in the appendix to this petition.

STATEMENT OF THE CASE

The Interstate Commerce Commission revoked the motor carrier operating license of AAACon on the ground that in its automobile driveaway business it had committed

consumer abuses. In that proceeding, there were no named parties or respondents other than the corporation, AAACon. The decretal provision of the final agency order in that proceeding, effective October 1, 1984, stated as follows:

> "Respondent AAACon's authority is ... revoked ..." A-49[1]

The order was not addressed to any person or entity other than AAACon.

After the revocation, Ralph J. Zola (Zola), who had controlled AAACon, purchased the stock of another motor carrier licensed by the Commission, Natco. Using assets and personnel of AAACon, Zola caused Natco to conduct automobile driveaway operations indistinguishable from those of AAACon. Mr. Zola's purchase of Natco's stock, and the Commission has acknowledged his purchase and control of its business, was a transaction not subject to the Commission's jurisdiction. (A 41 n. 8)

The Commission thereafter commenced a proceeding against Zola, Natco, and a related non-carrier, Auto Caravan, the Natco proceeding. The final order therein, as relevant, ended Mr. Zola's career by barring him for an indefinite period from directly or indirectly participating in any transport activities under the Commission's jurisdiction and revoked Natco's license.

The Court of Appeals for the Third Circuit, by order of November 16, 1989, upheld the Commission's order as to the revocation of Natco's certificate, but remanded the

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1. References to the appendix pages are prefaced by "A."

matter to the Commission with direction to narrow the scope and duration of the debarment order as to Mr. Zola.

In its decision, the Third Circuit found that although the 1984 Commission order contained no explicit restraining language and was not addressed to Mr. Zola, the act of revocation of AAACon's license constituted an implicit restraint against Mr. Zola acquiring the stock of another carrier and continuing in the automobile driveaway business. It found that the agency could sanction (proceed against and restrain) Zola, an individual who was not a licensee, and bar him from activities subject to the agency's jurisdiction.

The jurisdiction of the Court below is based upon 28 U.S. Code Sec. 2321(a), 2342(5), 2347 and 2349.

ARGUMENT

I

A LICENSE REVOCATION DOES NOT CONSTITUTE A RESTRAINT

The Court below held that the order revoking AAACon's license, which contained no restraining language and was not addressed to any party or entity other than AAACon (A 40), constituted an implied restraint upon Mr. Zola's future conduct.

To the contrary, such a constraint (or injunction) by implication is unenforceable:

> "... a decree will not be expanded by implication or intendment beyond the meaning of its terms when read in light of the issues and the purpose for which

> the suit was brought; and the facts found must constitute a plain violation of the decree so read." *Terminal Railroad Assoc. v. U.S., 266 U.S. 28, 29, (1924).*

Accord: Schmidt v. Lessard, 414 U.S. 473, 476-477 (1974). This applied as well to administrative restraints *N.L.R.B. v. Hecks Inc.* 388 F.2d 668, 670 (4th Cir. 1967).

This Court has heretofore corrected the departure by the Third Circuit from the foregoing rule in *International Longshoreman's Association v. Marine Trade Association*, 389 U.S. 64, 76, (1987). In that case, this Court reversed a determination that the terms of an injunction could be implied[2] rather than articulate, clear, and specific in enjoining behavior.

A revocation affects a licenser only. It is not a restraint. It does not direct even parties to cease and desist from any action, much less non-parties. This Court has recognized that a license revocation proceeding such as occurred with regard to AAACon does not constitute a bar to the subsequent acquisition of a license. *Regents of Georgia v. Carroll*, 338 U.S. 588, 594, 597-598 (1949). Accord: *Sea Island Broadcasting Corp. v. F.C.C.* 627 F 2d 240 (2nd Cir. 1980). A license revocation proceeding such as AAACon is quasi-criminal in nature. This Court has

2. If the AAACon revocation order had constituted a bar to Mr. Zola lawfully acquiring another carrier or subsequently operating that carrier, then the Natco-Zola sanction proceeding would have been redundant because Mr. Zola would already have been barred by the AAACon order. The Commission could have then gone to court under 49 U.S. Code Sec. 11702(b)(3) or 11703(a) to have Mr. Zola punished for a violation of the agency order. It did not do so because, as the Commission has acknowledged, the AAACon order contained no restraint, and no bar against Mr. Zola's participation in regulated transportation.

declared that such proceedings may not be used as a trap, by post hoc declarations that a restraint was intended. In *Re Ruffalo*, 390 U.S. 544, 550, 551 (1968). The decision of the Third Circuit is inconsistent with these authorities and provides no rationale for departure from such precedents.

II

THE COMMISSION HAS NO POWER TO SANCTION A NON-LICENSEE

The ruling of the Court of Appeals below has far-reaching implications. It holds that an agency which has not been granted explicit sanction authority over non-licensees has implied power to impose such sanctions. The Third Circuit has relied, in error, on cases holding that agencies such as the Federal Trade Commission and the Department of Agriculture have authority to sanction non-licensees. Those agencies, unlike the Commission, were explicitly granted sanction authority by Congress over "all persons". The Interstate Commerce Commission has been granted no such authority over the general public.

As more fully set forth below, in three different respects Congress has made clear that the Commission had no implied sanction power over non-licensees. First, it provided the agency with the alternative of going to court to seek sanctions. Second, it indicated that there was no general sanction power over all non-licensees, under amendments to the Act, 49 U.S. Code Sec. 11701 and Sec. 10934. Third, and most significantly, Congress specifically revoked earlier legislation which had authorized the Commission to join non-licensees in certain administrative proceedings.

a) The Decision Has Ignored The Interpretation Of *The Act By Congress*

Congress has enacted legislation interpreting the Interstate Commerce Act in a manner inconsistent with any assertion of implied sanction authority in the agency over non-licensees. It twice amended the Interstate Commerce Act since the recodification of 1878, first revising Section 11701(a) to add freight forwarders (who had by then become non-licensees) to the other specified classes of persons whom the Commission could sanction (brokers and carriers); and then adding another class of non-licensees --household goods movers agents -- to Section 10934 of the Act, to permit agency sanctions to apply to them.

Clearly, if the Commission already had general implied sanction authority over *all* non-licensees under Section 11701, as the Court below has now held, the above amendments would have been redundant. The specific inclusion of these two classes of non-licensees by Congress suggests that all other non-licensees are excluded from Commission sanction power. *Andrus v. Glover Const. Co.*, 446 U.S. 608, 616, 617 (1980).

b) *The Decision Ignores The Revocation By Congress Of The Explicit Sanction Authority Over Non-Licensees*

The Court below also ignored the explicit revocation by Congress of the Commission's prior jurisdiction to join all individuals in agency proceedings. The Commission once had authority under prior law 49 U.S. Code Sec. 42 to join non-licensees in agency proceedings. That law was revoked by Congress. it was not readopted. Rather it was reclassified by Congress under these laws that were "omit-

ted and repealed".[3]

In light of the action taken by Congress to define certain classes of non-licensees within the Commission's sanction powers, and the revocation by Congress in the Commission activity to join non-licensees otherwise in agency proceedings, the agency was clearly intended by Congress to have no power to sanction other non-licensees such as petitioner Zola. Rather, the agency was required to go to court to bring any proceeding against him, which court action had been authorized by Congress, 49 U.S. Code Sec. 11702 and 11703. Accord: *Wallach v. S.E.C.*, 202 F 2d 462 (D.C. Cir 1953).

This Court has on more than one occasion declared that where enabling legislation fails to give an agency jurisdiction over "all persons", and instead provides it with alternate judicial proceedings to sanction non-licensees, the agency may not claim implied sanction powers. *C.A.B. v. Delta Airlines*, 367 U.S. 316, 322, 325 (1961); *S.E.C. v. Sloan*, 436 U.S. 103 (1978). While an administrative agency is entitled to effectuate its orders, it has the obligation to follow the exclusive path of enforcement provided by Congress.

This Court has also held that sanction authority in an agency only exists if clearly and explicitly granted by Congress. In *Arrow-Hart & H. Elec. Co. v. F.T.C.*, 291 U.S. 587, 598 (1933) the Court stated:

> "The Commission is an administrative body possessing *only such powers as are granted by statute.* It may

3. See: Legislative History, P.L. 96-454 U.S. Code Cong. and Admin News p. 4271; Pub. Law 98-554 1984 U.S. Code Cong and Admin News p. 4769. The revocation is set forth in Public Law Tables of provisions of the Act "omitted and repealed." 49 U.S. Code 1989 Ed. p. 843.

> make only such orders as the Act authorizes . . . but, that accomplished, *has not the additional powers* of a court of equity to *grant other and further relief* . . . on the theory that *this is necessary to render effective* the prescribed statutory remedy." (Emphasis supplied)

See also: *Stark v. Wickard,* 321, U.S. 288, 309, 310 (1944); *Commissioner v. Acker,* 361 U.S. 87, 91 (1959) (sanction legislation is "construed strictly" and "one is not to be subjected to a penalty unless the words of the statute plainly impose it"). Accordingly, in the absence of an explicit grant of sanction authority over non-licensees the Third Circuit may not find such power through the concept of "implied authority."

The only decisions concerning the Commission's sanction power over non-licensees cited by the Court below, such as *I.C.C. v. American Trucking Association, Inc.,* 467 U.S. 353 (1984), and similar cases cited by the Commission such as *Trans Alaska Pipeline Rate Cases,* 436 U.S. 631 (1978) and *U.S. v. Chesapeake & Ohio R. Co.,* 426 U.S. 500 (1976), do not support a claim of implied sanction power over non-licensees. Each of the cases cited involved a licensee, and none involved a sanction proceeding. Further, they each concerned the agency's claim of an interstitial power subordinate to a greater power the agency had been explicitly granted (i.e., conditioning the acceptance of a tariff where the agency had authority to reject tariffs). In the remaining case, relied on by the Court below, *Amoskeag v. I.C.C.,* 590 F.2d 388 (1st Cir. 1979), the agency simply enforced a stipulation the licensee had already agreed to. Research has revealed no case in which an agency was held to have implied sanction authority over a non-licensee where the statute did not give the agency sanction powers in an agency proceeding over "all persons." No such authority was vested in the Commission by Congress.

The decision of the court below indicates that the sanction authority of the Commission over a non-licensee such as Mr. Zola arises out of the general power of the agency to effectuate the statute, under 49 U.S. Code Sec. 10321. That statutory source of power, which has been previously claimed by the Interstate Commerce Commission, has been uniformly rejected heretofore by every other Circuit Court considering it. *Central Forwarding Inc. v. I.C.C.*, 698 F.2d 1268 (5th Cir. 1983); *Central & So. Motor Freight v. I.C.C.*, 582 F2d 113, 118 (1st Cir. 1978); and *Global Van Lines v. I.C.C.*, 714 F.2d 1290, 1295 (5th Cir. 1983), 49 U.S. Code Sec. 10321 does no more than to preserve such authority as the agency *otherwise* had. The above-cited cases declare that the statute creates no new or different authority. Certainly where, as in the instant case, the agency is claiming sanction authority over non-licensees, explicit, rather than implied, authority is required.[4]

c) Authority to Investigate is Not Authority to Sanction

The court below incorrectly concluded that since the Commission is authorized to *investigate* non-licensees under U.S. Code Sec. 10321(b), the agency may also *sanction* non-licensees.

In this regard, the decision of the court below constitutes a far-reaching precedent. All agencies may now claim implied authority to sanction non-licensees, in the absence of any explicit grant of power from Congress over all persons so long as the agency asserts that the sanction power is necessary to effectuate the purposes of the act.

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4. It is all the more required where, as here, Congress has admonished the agency not to exceed its explicitly delegated powers. Sec. 3(a) Pub.L. 96-296; and H.R. Rep. No. 1069 96th Cong, 2d Sess 10-11, reprinted 1980 U.S. Code Cong. & Ad News 2283, 2292, 2293.

Such a proposition flies in the face of repeated declarations by Congress and decisions of this Court.

The reading of the statute by the court below is also inconsistent with decisions in other circuits. In *Wallach v. S.E.C.*, 202 F.2d 462 (D.C. Cir. 1953), the court considered the scope of agency power over specific classes of licensees.[5] In *Wallach*, the D.C. Circuit rejected the argument adopted by the Third Circuit herein, i.e., that the power to proceed against non-licensees was to be implied because there would otherwise be a "frustration of Congressional intention" or that it was "necessary and proper for carrying out the legislative mandate."

Wallach observed that such arguments were unavailing because the statute authorized the agency to go to court to obtain relief. The Securities and Exchange Act at the time of *Wallach* and the present Interstate Commerce Act provide for similar sanction proceedings in court—"the means for joining in one *judicial* proceeding—civil or criminal—all parties deemed necessary by the Commission. . . ." *Id.* at 464. The Interstate Commerce Commission has similar authorization from Congress under 49 U.S. Code Secs. 11702 and 11703. Such authorization was held in *Wallach* not to permit a joinder in proceedings before the Commission itself. *Id.* at 463.

The decision of the court below is also in confict with *Touche Ross & Co. v. S.E.C.*, 609 F.2d 570, 579 (2nd Cir. 1979), which the court below misinterpreted. The *Touche Ross* case is consistent with, and affirms, *Wallach*. The

5. In this regard, the Commission acknowledged to the Court below that there was no explicit authority in the Interstate Commerce Act over non-licensees and that the predecessor of 49 U.S. Code Sec. 11701 applied only to licensed "brokers and carriers." (A-45)

court specifically distinguished the factual situation there from *Wallach.* In *Touche Ross,* the party being sanctioned was a practitioner (accountant) before the agency, already subject to agency jurisdiction. The court in *Touche-Ross* affirmed the reasoning of *Wallach* noting:

> "the question in *Wallach* involved the extent to which former section 15(b)(4) of the 1934 Act could be used by the Commission to discipline *non-registered* salesmen of a registered broker-dealer. The section expressly authorized the SEC to revoke or suspend the registration of any broker or any dealer who has been found to have committed any violations. In *Wallach* however, the Commission attempted to extend the rule to *persons other than those specifically* encompassed by the section. The court held that the action was in plain violation of the statutory language, and in excess of the limited authority granted therein." (Emphasis supplied).

Thus, the court in *Touche Ross* read *Wallach* as rejecting an extension of agency authority under a statute similar to 49 U.S. Code Sec. 11701(a).

The Court below sought to avoid the prohibition against agency sanctions of a non-licensee non-party by resort to a theory that Mr. Zola was an *alter-ego* of AAACon. It did so despite the fact that the only evidence of Mr. Zola's conduct with regard to AAACon was adduced in the AAACon revocation proceeding—to which Mr. Zola was not a party. There was no evidence of Mr. Zola's alleged connection with the activities of AAACon in the Natco proceeding here under review. This Court has repeatedly ruled that a person may not be bound by a determination of the status in a proceeding to which he was not a party. *Martin v. Wilks,* __ U.S. __, 109 S.Ct. 2180 (1989). (Knowledge of a lawsuit is not a method by which a potential party may be bound; one is not bound

by a judgment *in personam* in litigation to which he is not a party); *Zenith Radio Corp. v. Hazeltine Research,* 395 U.S. 100, (1969), (determination of the status of a parent corporation in a trial of its subsidiary where the parent is not a party, vacated); *Blonder-Tongue Laboratories, Inc. v. University Foundation,* 402 U.S. 313, 329 (1971); *Hanberry v. Lee,* 311 U.S. 32, 40 (1940).

Inasmuch as such a determination would violate due process and the right to confront one's accusers. In the Natco proceeding Mr. Zola was found to have been the alter ego of AAACon as a result of conclusions drawn by the Commission in the AAACon proceeding to which he was not a party. No independent determination of Mr. Zola's alleged connection with AAACon's activity was adduced in any proceeding in which he was made a party. Accordingly, the Commission's basis of the determination that sanctions should be applied to him, i.e., that he was the alter ego of AAACon, should have been rejected by the Court below.

III

CONCLUSION

For the foregoing reasons it is respectfully prayed that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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Filed November 16, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-3499

RALPH J. ZOLA, NORTH AMERICAN TRANSPORT CO., INC., AND AUTO CARAVAN CORP.,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION, AND UNITED STATES OF AMERICA,
Respondents

On Appeal from Petition for Review
of the Interstate Commerce Commission
(ICC Docket No. MC-C-30003)

Argued September 29, 1989

Before: HIGGINBOTHAM, STAPLETON and SCIRICA, *Circuit Judges*.

(Filed November 16, 1989)

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., Circuit Judge.

The current proceeding is the most recent skirmish in an adversarial relationship between Ralph J. Zola and the Interstate Commerce Commission ("ICC" or "Commission") that has continued for almost two decades. In the order now under review, the ICC revoked the operating certificate of the North American Transport Co., Inc. ("Natco"), a carrier owned and operated by Zola. The Commission also prohibited Zola from engaging in any transportation activities within its jurisdiction. We will vacate the Commission's order only insofar as it bars Zola from conducting transportation activities that are wholly unrelated to those at issue in the present and prior I.C.C. proceedings. In all other respects, we will deny the petition for review.

I. Background

The present case is the culmination of almost two decades of I.C.C. proceedings involving Ralph J. Zola and his businesses. These proceedings began in 1971, when the ICC commenced an investigation of AAACon Auto Transport, Inc. ("AAACon"), an interstate carrier owned and operated by Zola. AAACon's automobile "driveaway" service hired out drivers to transport

customers' automobiles, pursuant to an ICC certificate permitting it to operate as a motor common carrier in the transportation of used passenger automobiles in the continental United States. In November 1973, an ICC administrative law judge ("ALJ") issued an initial decision finding the AAACon was not a fit carrier because of, *inter alia*, its handling of customers' damage and loss claims, improper provisions in its bills of lading, misrepresentations concerning its insurance coverage and bonding of drivers, and performance of acts not authorized by its ICC certificate (e.g., transporting repossessed, stolen, or abandoned automobiles, and performing driveaway services for automobile dealers). The ALJ ordered AAACon to cease and desist from these practices. *AAACon Auto Transport, Inc.*, I.C.C. No. MC-C-7287 (November 30, 1973), reprinted in Respondents' Addendum ("Add.") B at 13-16. The ALJ also noted Zola's close involvement with AAACon, stating that Zola served as vice president, director, treasurer, principal shareholder, and counsel for the corporation. Add. B at 10. Zola, who is an attorney, practiced with his brother in a law firm which maintained offices in common with AAACon and which handled the company's legal matters, including claim settlement. Add. B at 6.

The ICC affirmed the ALJ's cease and desist order and the United States Court of Appeals for the Second Circuit dismissed AAACon's petition for review, stating that the findings of "unjust and unreasonable practices" were supported by substantial evidence and that the application and scope of sanctions were proper. *AAACon Auto Transport, Inc.*, 124 M.C.C. 493 (1976), *aff'd sub nom. AAACon Auto Transport, Inc. v. I.C.C.*, No. 76-4147 (2d Cir. Feb. 14, 1977) (Add. C).

After receiving numerous complaints from the public, the ICC reopened its investigation of AAACon.

In a February 1983 decision and order ("AAACon revocation order"), an ALJ found that AAACon had repeatedly and willfully violated the terms of the cease and desist order and, as a result, that AAACon's certificate should be revoked.[1] Zola's role in the corporation was again described by the ALJ:

> When one considers the record as a whole (i.e. the oral testimony of the complaining witnesses and those witnesses sponsored by AAACon, as well as the exhibits sponsored by the parties), it is apparent that the sustaining force behind [AAACon] is that of its president; and it is his views which dominate and permeate the entire company from the very top to its lowest levels. . . .

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1. Both Natco and Zola make much of the ALJ's prescient observation that Zola might attempt to circumvent the Commission's authority by acquiring a "new corporate shell" to carry on AAACon's business. They assert that the ALJ properly noted that the revocation order does not "run[] against" Zola, and thus that the revocation of AAACon's authority did not "preclude the principals behind [AAACon] from forming a new corporation and obtaining nationwide driveaway authority." Add. K at 43. In essence, the petitioners contend that by purchasing Natco, and operating a driveaway business under the auspices of Auto Caravan, Zola was simply following the ALJ's suggestion on how he could circumvent the AAACon revocation order.

However, the ALJ in the AAACon proceeding did not have before him the facts of this case and, for the reasons discussed *infra*, we do not believe that the ALJ's dicta correctly states the scope of the Commission's power to enforce compliance with its fully adjudicated orders. *Cf.* Add. F at 22 (ICC stated in AAACon revocation decision that its independent determination that "AAACon's egregious violations of the cease and desist order warrant revocation" renders moot issues regarding ALJ's dicta). In any event, the petitioners mischaracterize the context and intent of the ALJ's discussion in this regard, which was essentially a complaint about some of the limitations on the Commission's ability to deal effectively with individuals, such as Zola, who willfully and repeatedly disregard the ICC's cease and desist orders.

. . . .

> The evidence reflects that when [AAACon's] Review Committee (composed of Messrs. Zola, Blackman, and Silvestri) meet to discuss and decide the larger claims, it is Mr. Zola's view which prevails even when such view is not in accord with those of Messrs. Blackman and Silvestri. It is apparent to this Judge that what is lacking is not guidance from the Commission, but a commitment from [Zola] to a firm adherence to the Commission's cease and desist order and making certain that AAACon's officials, employees, agents, and drivers understand that violations of that order will not be tolerated.

Add. K at 36-37.

On appeal, the AAACon revocation order was affirmed by the ICC and the United States Court of Appeals for the District of Columbia Circuit. In its August 1984 decision, the ICC noted:

> The record reveals that even the entry of the cease and desist order in 1976 did not dissuade AAACon from continuing to engage in activities of the type proscribed. Indeed, it appears that respondent simply masked certain prohibited activities and continued them. Consumer fraud, abuse, and harassment continued . . . . Respondent, far from demonstrating compliance, has shown disdain and contumacy.

AAACon Auto Transport, Inc., Investigation and Revocation of Certificate, ICC No. MC-C-7287 (July 30, 1984), Add. F at 21-22. In affirming the ICC, the D.C. Circuit remarked that "'[s]ubstantial' does not do justice to the extent of the evidence of Aaacon's violations of the 1976 order -- 'overwhelming' is perhaps a more appropriate adjective." *AAACon Auto Transport, Inc. v. Interstate Commerce Commission*,

792 F.2d 1156, 1160 (D.C.Cir. 1986), *cert. denied*, 481 U.S. 1048 (1987).

Simultaneous with his legal challenge to the AAACon revocation order, Zola was actively pursuing extra-judicial means of escaping the effect of the Commission's order. Following the ALJ's initial decision, two of Zola's relatives unsuccessfully sought ICC interstate transportation licenses. On June 6, 1983, Irving Zola, Ralph Zola's father, applied for an ICC certificate for a non-operating company called "AA Babcock." The ICC originally granted the application, but cancelled the certificate in a January 1986 Decision and Order after finding that the AA Babcock was a "paper corporation" set up to allow the Zolas to continue operating AAACon's auto driveaway service.[2] *AA Babcock Transport, Inc. Common Carrier Application*, I.C.C. No. MC-168499 (January 24, 1986) (Add. G.), *aff'd sub nom., AA Babcock Transport, Inc.*

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2. In its decision, the ICC stated that the

> evidence of deception, *i.e.*, a sham corporation, with no offices, no principals, and a bogus legal representative, . . . adequately supports our finding that Irving Zola willfully misled this Commission to believe that a new trucking company, genuinely interested in performing a nationwide general commodities service, was being licensed. It is plain that Irving Zola who, at 70 years of age, and who had spent about a decade in retirement in Florida (and whose wife, the record shows, never even heard of AA Babcock, and whose Fort Worth attorney never even met nor spoke with him) had absolutely no genuine intention of moving himself and his wife to Fort Worth, TX to commence a nationwide interstate general commodities trucking operation. It was simply a scheme devised to cause this Commission to issue authority to Irving Zola -- authority that would serve as insurance for the Zola family in the event that this Commission revoked, as we in fact did, the AAACon Authority.

Add. G at 7.

v. Interstate Commerce Commission, No. 86-1173 (D.C.Cir. June 30, 1987). On October 20, 1983, a company called "AA Aaron", owned by Marion Zola, Ralph Zola's sister (who was a 20% AAACon shareholder), applied for a license as a broker for the interstate transportation of general commodities. However, after the ICC issued a decision scheduling a hearing on the applicant's fitness, Add. J,[3] this application was withdrawn.[4]

On October 8, 1984, the same date that the revocation of AAACon became effective,[5] Zola --

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3. The decision scheduling this hearing notified the applicant that the ICC considered that there was "reason to believe that the principals of AAACON may be the real parties in interest in this application; and that these individuals may be seeking a method of conducting essentially the same operations as those of AAACON, under the guise of acting as a broker for the transportation of property." Add. J. at 2.

4. Natco argues strenuously that the proceedings involving applications by Zola's relatives are irrelevant to the present action because Zola was not a party to those proceedings, and "[n]o evidence was adduced demonstrating or even suggesting that Mr. Zola engaged in any wrongdoing in connection with those applications." Natco Reply Brief at 7.

Although the applications by Irving and Marion Zola are by no means critical to our decision, we utterly disagree with Natco's characterization of these proceedings. There was more than substantial evidence in *AA Babcock* to support the ICC's finding that Irving Zola's application for a certificate was a blatant attempt by the Zola family to circumvent the AAACon revocation order.

It is true that Marion Zola's application in *AA Aaron* was voluntarily withdrawn before the hearing. However, given the more than ample evidence of Ralph Zola's attempts to circumvent the AAACon order, we need not be blind to the possibility, if not the likelihood, that this application was also part of a scheme to circumvent the AAACon revocation order.

5. The former owner of Natco, Pinnie Oliver, testified at the administrative hearing that the closing date was selected by Zola. Appendix ("App.") at 17.

proceeding under the corporate name Watermill Corporation -- closed on a contract to purchase the stock of Natco. At the time, Natco was an operationally defunct entity whose only significant asset was an ICC certificate of public convenience and necessity permitting it to transport general commodities. Zola paid the $12,000 purchase price with a check from his personal account. Respondents' Appendix ("Resp. App.") at 2-3. In October 1984, Zola's law firm filed articles of incorporation for Auto Caravan Corp. ("Auto Caravan"), listing Ralph Zola as sole shareholder, officer, and director. *See id.* at 7-8.

Zola then engaged in what may appropriately be described as a "shell game" to enable Natco and Auto Caravan to resume AAACon's operations without interruption. His strategy was mapped out at a September 1984 convention of AAACon agents and office managers.[6] At the meeting, Zola stated that Auto Caravan would issue new agency agreements, explaining: "the intent of the agreements, I can tell you right now, will be to put you in the same position you were under AAACon's operation, with zero changes." Resp. App. at 64. Zola explained that the "tariffs, charges, and the contract terms, with a very, very few technical exceptions . . . will be exactly the same as now used by AAACon . . . .You will hardly even notice the difference in the forms except the name itself." *Id.* at 57. He also stated that the phone numbers used by AAACon would remain the same. *Id.* at 61.

Zola reassured the AAACon agents and employees:

So again, you are going to end up on October 8th

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6. Zola's remarks were tape recorded by a number of convention participants. Transcripts of the recordings were admitted into the record at the administrative hearing. In its decision, the Commission noted that it is "irrefutable that Mr. Zola made the statements attributed to him." App. at 39 n.5.

where you are on October 7th, hopefully, if this thing comes off the way it is supposed to. . . .

. . .

When I say if this goes off as planned, I mean the printing gets distributed by United Parcel to every office and the contracts don't have the word "AAACON" where it doesn't belong. The rights are already --how can I put this legally -- arranged for in a way that is legally binding. So on October 8th, Auto Caravan shall, like Phoenix, arise from the ashes, and there is no way to stop it. Okay?

Id. at 65.

Zola instructed his audience on how to describe to the public the relationship between the old AAACon and the new Auto Caravan:

Now, if you are called up and asked about AAACon and they probe, well, what is the relationship of Auto Caravan to AAACon, undoubtedly that is only one of two people, it's the ICC or it's a competitor. The public, God bless them, doesn't know from nothing. They want their car shipped. They know the name in the phone book . . . .

. . .

If someone finally says, "Is this AAACon Auto Transport" and pushes you that way, you say, "I used to be an agent for them, now I'm an agent for Auto Caravan." Stick your chin right out because all you are doing is getting it from someone who is pulling your strings.

Id. at 58-60.

Zola offered further public relations suggestions in the following colloquy at the convention.

FROM THE FLOOR: You are going to get a question like, when you answer the phone and say, Auto Caravan, they are going to say, well, how long

have you been in business. We never heard of you before.

MR. ZOLA: You have been in business for several years under another name. Now, I don't mean AAACON by that. Auto Caravan used to be North American Transport Company, [a] business [for] over two and a half years. Or, I have been in this business ten years, how long have you been in the business?

FROM THE FLOOR: About seven years.

MR. ZOLA: I have been in this business over seven years, you tell them. You never heard of us? We are the company that owns offices in more major cities than any other company in the United States.

What you do is, he doesn't know what he doesn't know.

FROM THE FLOOR: I am not talking about the individual but you are going to get your business accounts.

MR. ZOLA: Right

FROM THE FLOOR: And they are going to say, well, now Auto Caravan is a new name to me.

MR. ZOLA: Right.

FROM THE FLOOR: I don't believe I have ever heard of them before.

MR. ZOLA: Right. The answer is, if they know you, you can say, you heard of AAACON. We used to be with AAACON, not we used to be AAACON, but we used to be with AAACON. We found a name that is easier to spell. We bought greater authority, more rights and then you go into your pitch.

FROM THE FLOOR: (Inaudible.) Could we say that we felt like we had to expand into a lot of different areas?

MR. ZOLA: We are expanding into a lot of different areas.

FROM THE FLOOR: So on that basis, we decided a name that had more universal appeal?

MR. ZOLA: I will let you throw the bull the way you see fit.

[Laughter.]

MR. ZOLA: The only thing I don't want you to do is tell them this is the same corporate entity. You can say to them simply, just work it into the conversation quickly, we thought we ought to get more rights because we are expanding, we obtained a new corporate entity, we have a name, you see how it is working, we have a name that is easy to understand.

Id. at 77-78.

Zola reiterated his advice to AAACon employees and agents in an October 2, 1984 memorandum, in which he stated that "as of October 8, 1984, AAACon will stop transporting vehicles and Auto Caravan, a division of North American Transport Co., Inc., will begin transporting vehicles in interstate commerce." He stated that agents would soon be receiving agency agreements and tariffs that "will closely match AAACon's." He advised the agents to destroy unused AAACon material; change the yellow pages, postal, and building directory listings to "Auto Caravan"; and advise customers that all vehicles in transit on or after October 8 were being transported by Auto Caravan -- a carrier with "the same insurance and contract terms as AAACon." *Id.* at 5.

In the memorandum, Zola repeated his instructions on the proper method of describing the Auto Caravan to outsiders.

> On and after October 8th, no doubt your phones will be ringing from three sources: (1) legitimate customers; (2) your competitors; and (3) the I.C.C. As to your legitimate customers, just answer the phone "Auto Transport", and send out the literature of Auto Caravan.
>
> As to anyone who asks you "Is this AAACon?", simply state that you used to work for AAACon, this is now Auto Caravan -- a new corporate entity. If they press you on it a great deal, it is probably a competitor or the ICC, and you can make it clear that it is a different company and for any technical questions, they can call the home office and ask for Harvey or Ralph and we'll be happy to explain it to them in very great detail. To your customers, stress that we have the same insurance and we offer the same fine service that you offered with AAACon.
>
> *Never* say merely that "AAACon has changed its name."

Id. at 6.

Several AAACon agents who remained during the transition period later testified that Natco/Auto Caravan's procedures and operations were virtually identical to AAACon's, except for the phone answering procedure. *See, e.g.*, Resp. App. at 82-88. Furthermore, to prevent the loss of sales agents, and, particularly, to prevent AAACon's telephone numbers to be taken by defecting agents, Natco and AAACon, through Zola's law firm, filed lawsuits against a

number of agents who refused to work for Natco after the transition. Appendix ("App.") at 43-44.[7]

When the ICC learned of the emergence of Natco/Auto Caravan, it commenced an investigatory proceeding. In its August 1986 decision opening this proceeding, the ICC ordered Zola and Natco/Auto Caravan to show cause why Natco's operating authority should not be revoked, and why Zola should not be ordered "permanently to cease and desist from engaging, directly or indirectly, in any for-hire transportation activities within [the] Commission's jurisdiction." *Id.* at 9.[8] Extensive hearings before an ALJ, involving over 50 witnesses, resulted in a December 1987 initial decision which found that Zola "intentionally and willfully evaded" the AAACon revocation order by continuing AAACon's business through Natco/Auto Caravan. The ALJ concluded:

> The only *effective* remedial device is the extinguishment of the Zola/Natco/[Auto Caravan]

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7. The lawsuits against former AAACon agents are relevant to the issue of whether Zola and the other principals behind AAACon intended for Natco to carry on AAACon's operations. We agree with the characterization of these lawsuits in the Commission's decision.

> The ALJ properly found that the ultimate merits of those lawsuits are not a matter for consideration in this proceeding. Nevertheless, the testimony of the former agents and employees is instructive in the light it sheds on Mr. Zola's course of action. Whatever other purpose the lawsuits might serve, they did tend to perpetuate the AAACon operations.

App. at 46.

8. Zola's suit to enjoin the Natco revocation proceedings was dismissed on grounds of ripeness and failure to demonstrate irreparable injury. *Zola v. I.C.C.*, No. 86-5127 (D.N.J. May 1, 1987)(Add. I), *aff'd* No. 87-5415 (3d Cir. Jan. 14, 1988).

> subterfuge through an order revoking Natco's operating authority (No. MC-162160) and directing Zola to cease and desist from engaging, directly or indirectly, in any for-hire transportation activities within the Commission's jurisdiction. . . . The Commission, upon a petition or application by Zola, may remove this prohibition . . . upon a finding that it is no longer necessary. Such action shall not be unreasonably withheld.

Id. at 31.

On June 21, 1989, the ICC affirmed the ALJ's order. The Commission stated that the 1984 AAACon revocation order was "not merely a formalistic action. It was intended as a severe, final sanction warranted by the egregious violations of the agency's order directing AAACon to cease and desist from committing specified deceptive, abusive, and unlawful practices. The clear purpose and import of the revocation order was to permanently terminate the AAACon operations." App. at 44. The ICC found that the evidence was "crystal clear [that] the AAACon operations did not miss a beat when the revocation order became effective" but merely continued under a different name. *Id.* at 44-45. The ICC considered that the evidence of Zola's role in the scheme to circumvent the AAACon order was "overwhelming."

> Mr. Zola advised his agents and employees to assure skeptics that "we intend to be here at the same stand, day in, day out, week in, week out, for years, and that nothing has changed." His intention to evade the Commission's order is evident in his boast to them that the operations would continue despite the Commission's "annoying" proceedings.

Id. at 45.

The Commission stated that the revocation of Natco's operating authority and the debarment sanction against Zola were necessary to ensure the integrity of its orders and the administrative process. App. at 48.

> Respondents contend that Mr. Zola is being foreclosed from engaging in the transportation industry without having been a party to any proceeding in which he was charged with wrongdoing. This argument overlooks the obvious. It is here in *this proceeding* that Mr. Zola has been charged with devising and putting into effect a scheme for evading an order of the Commission. Mr. Zola has also been charged with a direct violation of the revocation decision which, by obvious implication, ordered AAACon to cease operations. It is well-settled that a command to a corporation is, in effect, a command to those who are officially responsible for the conduct of its affairs. . . . In any event, all the evidence points to the fact that Mr. Zola was the *alter ego* of AAACon, and he is now the *alter ego* of NATCO/Auto Caravan.

Id. at 49-50 (footnote omitted). The ICC concluded that the revocation of Natco's certificate was warranted because the Natco enterprise was a subterfuge to escape the AAACon revocation order. The Commission also stated that in light of Zola's "central role and responsibility" for AAACon's consumer fraud and abuse, and his willful scheme to evade and circumvent the revocation order, it was "necessary and appropriate to now require Mr. Zola to cease and desist from engaging in *any* forhire transportation activities within our jurisdiction." *Id.* at 51.

In its final order, the ICC revoked Natco's operating authority and prohibited Auto Caravan and Caravan

Co. from conducting interstate for-hire transportation. The ICC also ordered Zola to "cease and desist, and thereafter refrain and abstain from, directly or indirectly engaging in any transportation activities within the Commission's jurisdiction until further order of the Commission." App. at 52.[9] In a footnote to the above provision, the Commission stated: "Upon petition from Ralph J. Zola and for good cause shown, the Commission may remove this prohibition in whole or in part upon a finding that it is no longer necessary." *Id.* at n.15.

Zola and Natco/Auto Caravan[10] now petition for review of the ICC's order.

II. Discussion

As the Commission noted in its June 1989 opinion, App. at 47-48, this case is exceptional in a number of respects. AAACon, under Zola's management and control, was found to have committed an exceptional amount of consumer fraud and abuse. The ICC expended exceptional efforts to address and remedy AAACon's misconduct, including in-depth investigations of consumer complaints, extensive administrative proceedings, and a specific cease and desist order proscribing AAACon's unlawful conduct. AAACon, still under Zola's direct control, then repeatedly and willfully violated the terms of that order, prompting the ICC to take the exceptional step -- again after extensive administrative proceedings -- of revoking AAACon's operating authority. Zola again went to exceptional lengths to flout the Commission's order, this time by continuing AAACon's operations

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9. *See infra* note 13.

10. Auto Caravan functions as the operating division of Natco. Therefore, references to Natco apply also to Auto Caravan.

under the auspices of his newly acquired carrier. Finally, in its decision revoking the new corporation's operating authority, the Commission took the apparently unprecedented action of barring an individual, for an indefinite period, from engaging in any "transportation activities" within its jurisdiction.

Because the validity of the two components of the Commission's order, the revocation of Natco's operating authority and the debarment of Zola, involve different considerations, we shall discuss the two measures separately. First, however, we shall review the statutory basis for the Commission's enforcement and sanctioning powers.

A. ICC Enforcement Authority

Administrative agencies such as the ICC have limited powers to impose sanctions and institute remedies for statutory violations. Under the Administrative Procedure Act, an agency is prohibited from imposing a sanction "except within jurisdiction delegated to the agency and as authorized by law." 5 U.S.C. § 558(b); *see also Arrow-Hart & Hegeman Electric Co. v. Federal Trade Commission*, 291 U.S. 587, 598 (1934)("The Commission is an administrative body possessing only such powers which are granted by statute."). However, in recognition of their particular expertise and complex responsibilities, regulatory agencies are afforded some discretion in determining which sanctions or remedies would best effectuate statutory objectives. The courts may intervene only if the agency's sanction or remedy "is unwarranted in law or is without justification in fact. . . ." *American Power & Light v. Securities and Exchange Commission*, 329 U.S. 90, 112-13 (1946); *see also Atlantic Refining Company v. Federal Trade Commission*, 381 U.S. 357, 367-68 (1965); 4 Stein, Mitchell, Mezines, *Administrative Law* § 42.01 (1989).

The Interstate Commerce Act ("Act"), 49 U.S.C. § 10101, *et seq.*, vests the Interstate Commerce Commission with the authority to supervise and regulate interstate carriers. The Supreme Court has interpreted this grant of power in a common sense fashion to give effect to the Act's purposes. In *Interstate Commerce Commission v. American Trucking Associations, Inc.*, 467 U.S. 354 (1984), the Court held that the ICC's statutory rate-setting authority gave it the power to reject effective tariffs that are in substantial violation of rate bureau agreements, even though this remedial power was not expressly delegated to the Commission. The Court explained:

> The Commission's authority under the Interstate Commerce Act is not bounded by the powers expressly enumerated in the Act. . . . [T]he Commission also has discretion to take actions that are "'legitimate, reasonable, and direct[ly] adjunct to the Commission's explicit statutory power.'" We have recognized that the Commission may elaborate upon its express statutory remedies when necessary to achieve specific statutory goals. . . .

467 U.S. at 365 (citations omitted). The Court noted that the doctrine of ICC discretion arose out of a recognition that since the Act's drafters could not "'include specific consideration of every evil sought to be corrected,' the absence of express remedial authority should not force the Commission 'to sit idly by and wink at practices that lead to violations of [the Act's] provisions.'" *Id.* (quoting *American Trucking Associations, Inc. v. United States*, 344 U.S. 298, 309-10, 311 (1953)); *see also In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 654-57 (1978)(ICC has necessary "ancillary" powers which are not specifically stated in its express statutory grant of

authority to suspend tariffs); *United States v. Chesapeake & Ohio Railway Co.*, 426 U.S. 500, 514 (1976)(ICC has power to condition railroad rate increases on requirement that railroads devote increased revenues to maintenance and capital improvements).

The Commission's discretionary remedial powers are not limited to the ratemaking area. For example, in *Amoskeag Co. v. Interstate Commerce Commission*, 590 F.2d 388 (1st Cir. 1979), the court upheld an ICC order prohibiting Amoskeag Co., the owner of one railroad, from making a tender offer for shares of a second railroad. Despite the lack of a provision in the Act specifically empowering the ICC to act to prevent potential violations of the Act's prohibition against a person controlling two or more common carriers without prior ICC approval,[11] the court considered that the likelihood of a statutory violation, together with Amoskeag's previous commitment not to purchase the railroad's stock without Commission approval, supported the ICC's action. The court stated: "We do not cavil with Amoskeag's observation that the Commission is without authority to exercise power not entrusted to it by Congress. We do, however, quarrel with the suggestion that an explicit grant of power must underpin each such exercise." 590 F.2d at 392. The court held that the ICC was justified in "acting to protect the integrity of its jurisdiction." 590 F.2d at 393.

B. Natco Revocation

In this case, the ICC's 1984 order terminating AAACon's operating authority was made pursuant to

11. 49 U.S.C. § 11343, formerly codified at 49 U.S.C. §§ 5(2), (5), prohibits a person from acquiring two carriers without prior ICC approval.

its power under 49 U.S.C. § 10925(b) to revoke a certificate for willful failure to comply with a Commission order. The Commission's decision was emphatic in its prohibition against AAACon's operation, finding that a revocation of AAACon's certificate was the only effective means of preventing the carrier's willful and repeated violations of the prior cease and desist order. The revocation order has been fully adjudicated, and cannot now be challenged collaterally.

The petitioners contend, however, that Zola's purchase of Natco was "open and lawful." They further contend that because Zola was a not a party to the AAACon revocation proceeding, the Commission improperly used the AAACon revocation order as a basis for revoking Natco's certificate.

We disagree. The Commission's investigation and its revocation of Natco's certificate were well within the ICC's statutory authority. The Interstate Commerce Act gives the ICC the authority to "inquire into and report on the management of the business of" interstate carriers and of the business of a person "controlling, controlled by, or under common control with those carriers." 49 U.S.C. § 10321(b); *see also* 49 U.S.C. § 11701(a)("The . . . Commission may begin an investigation under this subtitle on its own initiative or on complaint.").[12] Thus, the Act clearly authorized the ICC investigation of both Natco, a motor carrier, and Zola, Natco's owner. *Cf. Comet Electronics, Inc. v. United States*, 381 F.Supp. 1233, 1241 (W.D.Mo. 1974), *aff'd without opinion*, 420 U.S. 999 (1975)(Act empowers Commission to investigate non-party railroad holding company). Once the ICC found, after notice, investigation, and an administrative hearing,

12. Furthermore, 49 U.S.C. § 10321(a) provides that "[e]numeration of a power of the Commission . . . does not exclude another power the Commission may have. . . ."

that Natco was simply a continuation of AAACon, its revocation of Natco's certificate was an "appropriate action to compel compliance" with the Act and with the prior, fully adjudicated AAACon revocation order. 49 U.S.C. § 11701(a).

The evidence before the Commission was more than sufficient to support its finding that Natco was a successor to AAACon, and that both were under the direct control of Ralph Zola. This conclusion is evident from a review of only the main events in the AAACon-Natco metamorphosis. Zola negotiated for the purchase of Natco, an operationally defunct corporation, at a time when it was obvious that AAACon's certificate would be revoked. He instructed AAACon's employees and agents that under Auto Caravan they would be "in the same position" as they were under AAACon, "with zero changes." Resp. App. at 64. He engineered the Natco purchase so that it was concluded immediately upon revocation of AAACon's certificate. Finally, Natco carried on AAACon's activities without any significant changes in management, personnel, facilities, or operating procedures, except for changes necessarily associated with the business's new name. Given this background, the petitioners' contention that Natco's operating authority is unaffected by the Commission's order revoking AAACon's certificate is simply untenable.

Equally untenable is the petitioners' assertion that the Commission was required to pursue alternative judicial or administrative remedies in order to revoke Natco's certificate. After a full investigation and administrative hearing, the ICC determined that for all practical purposes Natco and AAACon are simply two names for the same enterprise. The propriety of the Commission's revocation of that enterprise's operating authority was fully and finally determined in the AAACon revocation proceeding. We see no basis in the

Interstate Commerce Act or elsewhere for requiring the Commission to institute alternative or additional proceedings against Zola or Natco in order to enforce compliance with the fully adjudicated AAACon revocation order.

At the conclusion of the decision upholding the AAACon revocation order, Judge Wald reiterated the court's holdings that the order was procedurally correct and supported by substantial evidence. She observed that "AAACon's protracted journey through the Commission and the courts has finally come to a dead end." *AAACon*, 792 F.2d at 1165. Unfortunately, Judge Wald's prediction has been proven false, not because her court misinterpreted or misapplied the law, but because Zola has again demonstrated his propensity to violate and circumvent ICC orders. As Zola himself described it, Natco/Auto Caravan has emerged "like Phoenix" from AAACon's ashes to carry on its operations without any significant change in personnel, facilities, or operating procedures.

If the petitioners still have any lingering doubts about the meaning of the AAACon revocation order, or any plans for any further Phoenix-like recreations of the AAACon operation, we intend now to put those doubts and plans to rest. The unequivocal meaning and intent of that order was to terminate AAACon's operating authority, and thus to bar it from continuing any of the transportation activities previously permitted under its certificate. By its terms, the order applies to AAACon Auto Transport, Inc. By necessary implication, it applies also to Zola, Natco, Auto Caravan, and to all other individuals or entities who intend to continue AAACon's operations under other auspices. We therefore uphold the Commission's revocation of Natco's operating authority, as well as its prohibition against Auto Caravan's interstate for-hire transportation activities.

C. Zola Debarment

The ICC's order barring Zola from "directly or indirectly engaging in any transportation activities within the Commission's jurisdiction" is an extreme measure. Indeed, the order appears to be unprecedented in its scope (i.e., barring an individual from conducting *any* activities within the Commission's jurisdiction)[13] and in its indefinite duration. For the reasons discussed below, we conclude that debarment is an appropriate remedy, given the exceptional circumstances of this case. However, we also conclude that even the extraordinary nature of this case does not warrant a debarment order as broad as that issued by the Commission.

As we have already stated, a necessary corollary to the Commission's power to issue a revocation order under 49 U.S.C. § 10925 is the power to apply that order to a "new" carrier, owned and operated by the same individuals, which performs activities identical to those at issue in the revocation proceeding. The petitioners contend, however, that the Commission may not enforce its revocation orders by issuing a cease and desist order against a non-licensee, such as Zola, who was not named as a party in the initial revocation action.

Although we consider an agency's debarment of an individual to be an extreme remedy for statutory violations and non-compliance with agency orders, we

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13. We have some doubts about whether the Commission intended to bar Zola from engaging in *all* transportation activities within its jurisdiction, or whether it instead intended only to prohibit him from conducting "for-hire transportation activities," as specified in the Commission's "show cause" order, App. at 12, the order of the ALJ, *id.* at 31, and the Commission's decision. *Id.* at 51. However, because Zola is bound by the clear language of the Commission's final order, it is that language which we must consider.

do not believe that debarment in this case is either unwarranted in law or without justification in fact. Congress has entrusted the Commission with the authority to amend, suspend, or revoke a motor carrier's certificate for willful failure to comply with the Act, an ICC order, or the terms of its certificate, 49 U.S.C. § 10925(b), and has further given the ICC the general authority to take appropriate action to compel compliance with the Act. 49 U.S.C. § 11701(a).

The petitioners argue that because § 11701(a) speaks in terms of "carrier[s] and broker[s]", the statute does not authorize orders directed at "non-licensees" such as Zola. However, the evidence before the Commission was more than adequate to support its conclusion that Zola at all relevant times directly controlled and managed, and indeed, was the alter ego of, Natco and AAACon. The record also establishes that Zola was directly responsible for the violation of the prior cease and desist and revocation orders issued against AAACon. In such a situation, the ICC's cease and desist order is fully consistent with the settled principle that, to give effect to its orders, an agency may take action against the individuals controlling the regulated corporation. *See Federal Trade Commission v. Standard Education Society*, 302 U.S. 112, 119 (1937)(Commission properly included corporation's principals in its cease and desist order when its findings established that principals are likely to continue to attempt to evade its orders); *Mattes v. United States*, 721 F.2d 1125, 1131-32 (7th Cir. 1983)(Department of Agriculture properly denied an application to operate a stockyard on the ground that the approval would have circumvented a suspension order entered against applicant's husband); *Bruhn's Freezer Meats of Chicago, Inc. v. United States Department of Agriculture*, 438 F.2d 1332, 1343 (8th Cir.

1971)(owners and officers of regulated corporation properly included in cease and desist order); *Sebastopol Meat Co. v. Secretary of Agriculture*, 440 F.2d 983, 985 (9th Cir. 1971)(owner and alter ego of corporation properly included in cease and desist order); *Guziak v. Federal Trade Commission*, 361 F.2d 700, 704 (8th Cir. 1966), *cert. denied* 385 U.S. 1007 (1967)(corporate principals properly included in cease and desist order).

Contrary to the petitioners' assertion, *Wallach v. Securities and Exchange Commission*, 202 F.2d 462 (D.C. Cir. 1953), is not to the contrary. As the court explained in *Touche Ross & Co. v. Securities and Exchange Commission*, 609 F.2d 570, 580 n. 16 (2d Cir. 1979), *Wallach* stands for the limited proposition that the S.E.C. may not discipline nonregistered salesmen of a registered broker-dealer, since the Securities Exchange Act had limited the SEC's suspension and revocation power to brokers and dealers. In this case, motor carriers such as Natco are expressly encompassed in the ICC's revocation authority, 49 U.S.C. § 10925(b), and the Commission is empowered to inquire into the business of persons such as Zola who control motor carriers. 49 U.S.C. § 10321(b). For the reasons stated above, we consider that the Commission's revocation power and its power to take appropriate action to compel compliance with the Act, 49 U.S.C. § 11701, furnish a sufficient statutory basis for the cease and desist order against Zola. We note also that the Act specifies that the enumeration of a power of the Commission does not exclude another power the Commission may have in carrying out the Act. 49 U.S.C. § 10321(a).

We are also persuaded that under the particular circumstances of this case, the debarment remedy constitutes an "appropriate action to compel compliance" with the Act. 49 U.S.C. § 11701. As

recounted above, and as detailed in the prior administrative and judicial decisions involving AAACon and Natco, Zola's conduct has for years been characterized by extreme and - until now - successful attempts to flout the Commission's orders and evade its jurisdiction. Given this individual's well established propensity to ignore what he regards as "annoying" ICC orders, the Commission was warranted in issuing a cease and desist against him that provides some assurance that he will not again attempt to circumvent the AAACon revocation order.

Although the debarment remedy is appropriate in this case, we do not believe that the scope and indefinite duration of the debarment order are rationally related to the Commission's legitimate goal of preventing this individual from once again resuscitating the AAACon enterprise. The Supreme Court has emphasized that in devising remedies for statutory violations, agencies and the courts have the duty "to give 'complete and efficacious effect to the prohibitions of the statute' with as little injury as possible to the interests of private parties or the general public." *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 130 (1962) (quoting *United States v. American Tobacco Co.*, 221 U.S. 106, 185 (1911)). Thus, "the choice of remedy is as important a decision as the initial construction of the statute and finding of a violation. The court or agency charged with this choice has a heavy responsibility to tailor the remedy to the particular facts of each case so as to best effectuate" the elimination of the statutory violation. 371 U.S. at 130.

As presently stated, the order prevents Zola from "directly or indirectly" engaging in a variety of transportation activities, such as those involving distinct types of motor carriers, and railroad, pipeline, and water carriers, *see* 49 U.S.C. § 10501, *et seq.*, that

are wholly unrelated to the automobile driveaway service at issue in the AAACon and Natco proceedings. It may be true that the record in this case provides little assurance that Zola presently intends to comply with the clear meaning of the AAACon revocation order. However, the prohibition against Zola's direct or indirect involvement in *any* ICC-regulated activity is simply too broad to be sustained. We shall therefore vacate the order only insofar as it bars Zola from engaging in transportation activities that are wholly unrelated to the automobile driveaway service at issue in the Commission's proceedings against AAACon, Natco, and Zola. Since the ICC has the particular expertise necessary to devise an order sufficient to accomplish the objective of terminating the relevant activities of the AAACon/Natco enterprise, we shall remand this matter to the Commission for proceedings necessary for the entry of such an order.

III. Conclusion

Insofar as ¶ 3 of the order under review prohibits petitioner Ralph J. Zola from conducting transportation activities that are wholly unrelated to those at issue in the prior proceedings against AAACon and in the present proceedings against Zola and Natco, the order will be vacated and the matter will be remanded to the ICC for the entry of an order consistent with Part II.C of this opinion. In all other respects, the petition for review will be denied. The stay of the Commission's order, with respect to all parts of the order except for the portion of ¶ 3 referred to above, is hereby lifted.

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING REHEARING DATED DECEMBER 18, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 89-3499
RALPH J. ZOLA, NORTH AMERICAN TRANSPORT CO., INC., AND AUTO CARAVAN CORP.,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, AND UNITED STATES OF AMERICA,

Respondents.

(ICC Docket No. Mc-C-30003)

SUR PETITION FOR REHEARING

Present, GIBBONS, *Chief Judge,* HIGGINBOTHAM. SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and NYGAARD, *Circuit Judges*

The petition for rehearing filed by petitioners in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,
/s/ A Leon Higginbotham
Circuit Judge

Dated: December 18, 1989

DECISION OF THE INTERSTATE COMMERCE COMMISSION IN MC-C-30003 DECIDED JUNE 21, 1989

RALPH J. ZOLA, ET. AL.-SHOW CAUSE PROCEEDING

NO. MC-C-30003

RALPH J. ZOLA, NORTH AMERICAN TRANSPORT CO., INC., AND AUTO CARAVAN CORP.-SHOW CAUSE PROCEEDING

Decided June 21, 1989

On appeal by respondents, the findings of the Administrative Law Judge, as supplemented in this decision, are affirmed. Respondents are found to have willfully violated the Commission's revocation order of July 30, 1984. The operating authority issued to respondent North American Transport Co., Inc. in MC-162160 and subnumbers thereunder is revoked. Respondent Ralph J. Zola is directed to cease and desist from directly or indirectly engaging in any transportation activities within the Commission's jurisdiction.

BY THE COMMISSION:

BACKGROUND

This case has a long and tortured history. It began in March 1971, when the Commission instituted an investigation and revocation proceeding in No. MC-C-7287, *AAACon Auto Transport-Invest. & Revoc. of Certif.*, to determine; among other things, whether AAACon Auto Transport, Inc. (AAACon) was engaging in unjust and unreasonable practices in connection with the transportation of automobiles, in drive-away service.

In 1973, after conducting oral hearings, an Administrative Law Judge (ALJ) issued an initial decision directing AAACon to cease and desist from numerous practices found to be unjust, unreasonable, and unlawful. Ralph Zola's early involvement in AAACon is reflected in this decision. Zola had joined AAACon in 1956 as vice president, treasurer, director and a principal shareholder, and thereafter had formed a law firm which maintained offices in common with AAACon and which handled all claims for AAACon. (at 6.) The ALJ particularly noted Mr. Zola's involvement in the perennially troublesome area of claims settlement. (*Id.* at 10).

The Commission affirmed, the ALJ's decision. *AAACon Auto Transport-Invest. & Revoc. of Certif.*, 124 M.C.C. 493 (1976) (*AAACon I), aff'd sub. nom., AAACon Auto Transport, Inc. v. ICC*, No. 76-4147 (2d Cir., Feb. 14, 1977). The cease and desist order contained 10 paragraphs detailing future prohibited activities: nine related to consumer abuse, and the tenth to abuse of regulatory constraints.

On July 28, 1976, Mr. Zola filed the requisite certificate of compliance on behalf of AAACon. Mr. Zola was the principal shareholder, president, and chief operating officer of AAACon as well as its counsel in the investigation proceeding.

In February 1978, the Commission reopened the proceeding in No. MC-C-7287 to determine whether AAACon had violated the Commission's 1976 cease and desist order and, if so, whether its operating authority should be suspended or revoked. Extensive evidentiary oral hearings were held before ALJ Sarbacher in four cities between August 1981 and May 1982. In an initial decision served February 28, 1983, as modified by a notice served March 22, 1983, the ALJ found: that AAACon had repeatedly violated each of the 10 paragraphs of the cease and desist order; that the violations were willful; and that,

as a result, AAACon's operating authority should be revoked. He discerned in AAACon an attitude of "the public be damned" (Initial decision, pp. 33,35), and he determined that AAACon simply had "thumbed its nose" at the Commission's cease and desist order. (*Id.* p. 43)

Mr. Zola's preeminent position with, and influence over the affairs of, AAACon at that time is summed up in the following observation of the ALJ (*id.* at 36-37):

> When one considers the record as a whole (i.e. the oral testimony of the complaining witnesses and those witnesses sponsored by AAACon, as well as the exhibits sponsored by the parties), it is apparent that the sustaining force behind respondent is that of its president [Mr. Zola]; and it is his views which dominate and permeate the entire company from the very top to its lowest levels***. [W]hen respondent's Review Committee***meet to discuss and decide the larger claims, it is Mr. Zola's view which prevails even when such view is not in accord with those of [the other members]***[W]hat is lacking is not guidance from the Commission, but a commitment from respondent's president to a firm adherence to the Commission's cease and desist order and making certain that AAACon's officials, employees, agents, and drivers understand that violations of that order will not be tolerated.

Moreover, Judge Sarbacher clearly saw Mr. Zola to be the *alter ego* of AAACon when he perceived the threat that another corporate shell might be formed in an attempt to circumvent the revocation order. (*Id.* at 43.)

On appeal, the Commission affirmed and adopted most of the ALJ's findings and conclusions, and revoked

all of AAACon's operating authority effective October 8, 1984. No. MC-C-7287,*AAACon Auto Transport, Inc., Investigation and Revocation of Certificate*(not printed), served August 7, 1984 (*AAACon II), aff'd sub. nom., AAACon Auto Transport, Inc. v. ICC*, 792 F.2d 1156 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 2178 (1987). We found that "the record reveals violations from border to border and coast to coast, in a wide variety of aspects of respondent's operations."(Decision, at. 15.) We determined that "AAACon's disregard and apparent contempt for the public are pervasive." (*Id.* at 15.) In summarizing our findings, we stated:

> The record reveals that even the entry of the cease and desist order in 1976 did not dissuade AAACon from continuing to engage in activities of the type proscribed. Indeed, it appears that respondent simply masked certain prohibited activities and continued them. Consumer fraud, abuse, and harassment continued ***. Respondent, far from demonstrating compliance, has shown disdain and contumacy.

Id. at 21-22. The Commission concluded that "AAACon's egregious violations of the cease and desist order warrant revocation." *Id.* at 22. In affirming our decision, the United States Court of Appeals for the District of Columbia Circuit characterized the evidence of violations of the cease and desist order as "overwhelming." 792 F.2d at 1160.

After the ALJ's decision recommending the revocation of AAACon's authority in *AAACon II* was served, members of the Zola family attempted to evade the effect of the revocation decision by perpetuating the AAACon operations through the use of different corporate names. In one such scheme an application was filed in June 1983 by Mr. Zola's father, Irving Zola, under the name AA BAbcock Transport, Inc. (AA Babcock), seeking

operating authority for a non-existing trucking company. Although the Commission initially granted the certificate on September 21, 1983, it later discovered the scheme and cancelled the AA Babcock certificate because of the fraud perpetrated on the Commission. No. MC-168499,*AA Babcock, Inc., Common Carrier Application* (not printed), served January 31, 1986, *aff'd sub. nom.,AA Babcock Transport, Inc. v. ICC*, No. 86-1173 (D.C. Cir., June 30, 1987).

In another application proceeding, Docket No. MC-171177, *AA Aaron, Inc., Broker - General Commodites, Nationwide* (not printed), served December 28, 1983, the Commission had reason to believe that the principals of AAACon may have been the real parties in interest and that the Zolas were attempting to obtain authority as part of scheme to continue the AAACon operations. The person whose name appeared on the AA Aaron application form was Mr. Zola's sister, Marion Joy Zola, who was also a shareholder and officer of AAACon. An oral hearing was called to investigate the matter, but eight days before the hearing was to be held, the AA Aaron application was withdrawn.

As the ALJ pointed out in this proceeding, Mr. Zola has failed to explain his asserted lack of connection to these applications. Initial Dec. at 3.

Subsequent to the revocation of AAACon's operating authority, an investigationn by the Commission's Office of Compliance and Consumer Assistance (OCCA) led us to believe that Ralph J. Zola had devised and employed another scheme for evading the import of the Commission's revocation order. On the effective date of revocation order, Mr. Zola purchased the controlling stock of North American Transport Co., Inc. (NATCO), which holds authority to transport general commodities (with exceptions) nationwide. Mr. Zola had also established an unincorporated "agent" of NATCO named Auto

Caravan Corp., whose name he would use in his dealings with the public. At Mr. Zola's direction, NATCO and Auto Caravan were continuing to use the same or substantially similar offices,officers, supervisors, agents, internal and external procedures, phone numbers, bills of lading, and tariff as had been used by AAACon. In brief, it appeared that Mr. Zola was continuing the AAACon operation under a new name.

Therefore, in a decision served September 12, 1986, the Commission instituted this proceeding against Mr. Zola, NATCO, and Auto Caravan, to determine whether: (a) all the operating authority issued by this Commission to NATCO should be revoked; and (b) an order should be entered directing Ralph J. Zola permanently to cease and desist from engaging, directly or indirectly, in any for-hire transportation activities within this Commission's jurisdiction.[1]

Hearings at various locations were held before ALJ Cross. First OCCA presented evidence supporting its allegations, in Ft. Lauderdale, FL, Minneapolis, MN, San Francisco, CA, and New York, NY, between February 1986 and March 1987. Respondents then presented their evidence, in Newark, NJ, Fort Lauderdale, Los Angeles, CA, New York, and Washington, DC, between May and September 1987. Approximately 55 witnesses testified at the hearings.[2]

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1. Although the decision instituting this proceeding was worded as a direction to the respondents to show cause why these actions should *not* be taken, the proceeding has not been conducted in that manner. OCCA was required to present its case first, and then respondents were afforded the opportunity to rebut OCCA's evidence.

2. No evidence of consumer abuse or consumer fraud was allowed, and no party was given an opportunity to show customers' satisfaction or dissatisfaction with the services of NATCO, as these matters were not in issue.

In his initial decision served December 15, 1987, ALJ Cross found that OCCA's unrebutted evidence provided convincing proof of the nexus between AAACon and its successors, NATCO/Auto Caravan, and of the unlawful continuation of AAACon's operations by those entities. He also found that the unrebutted evidence of record, coupled with Mr. Zola's apparent control over persons affiliated with AAACon and NATCO, clearly demonstrated that Mr. Zola was the sole moving force in continuing AAACon's activities, operations, and business through his new companies, NATCO and Auto Caravan. The ALJ therefore determined that Ralph J. Zola had willfully evaded the Commission's 1984 revocation order, by acquiring NATCO for the sole purpose of continuing the AAACon operations that had been ordered terminated. He further concluded that NATCO also was in willful violation of the revocation order. Finally, ALJ Cross determined that the only effective remedial device was the extinguishment of the Zola/NATCO/Auto Caravan subterfuge through an order revoking NATCO's operating authority and directing Mr. Zola personally to cease and desist from engaging, directly or indirectly, in any for-hire transportation activities within the Commission's jurisdiction.

Respondents have filed appeals to the initial decision, and OCCA has replied.

PRELIMINARY MATTERS

After OCCA submitted its reply statement, respondents filed a joint motion whereby: (1) Auto Caravan seeks leave to file an appeal; and (2) Ralph J. Zola and NATCO seek leave to file a reply to OCCA's reply and request an oral argument. OCCA moved to reject the pleading, and respondents replied to that motion.

Respondents argue that OCCA has raised challenges

to the initial decision, in part by proposing that the order of debarment include Auto Caravan, and that respondents should be permitted to reply to these challenges. Respondents also assert that there are recent decisions that are directly controlling on the issues involved here. Finally, respondents request oral argument on the grounds that OCCA has not addressed all of the issues raised by respondents, that this is a case of first impression, and that this proceeding raises significant issues of Constitutional rights and statutory construction.

Respondents' motions will be denied, and their tendered statement will be rejected. OCCA has not raised objections to the initial decision, and the purported appeal by Auto Caravan is little more than a repeat of arguments already advanced in the appeals of Mr. Zola and NATCO. The primary recent decisions respondents cite[3] involve voiding of certificates obtained through fraudulent applications and are not relevant here. Finally, no good reason appears for protracting this proceeding further. The record is sufficiently detailed to enable us to render a fully informed decision. The matters respondents wish to argue orally, such as the powers of Congress vis-a-vis those of the President, are not relevant to this proceeding.

PERTINENT FACTS

The ALJ's statement of facts is substantially correct in all material respects, and we affirm and adopt it as our own. We will summarize here only the most relevant and salient facts.[4]

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3. No. MC-C-30020, *B.J. Express, Inc.—Investigation and Revocation of Certificate,* (Not printed), served October 16 and November 16, 1987.

4. Any omission here of facts set forth by the ALJ does not indicate a disagreement with his fact findings.

The Commission's decision affirming the findings of ALJ Sarbacher and ordering AAACon's operating authority revoked was served on August 7, 1984 and became effective October 8, 1984. On the day after service of the Commission's decision, Ralph J. Zola sent to all AAACon company and agency offices a memorandum regarding the decision. That memo did not convey the import of the decision, other than by implication. Mr. Zola advised his offices that a competitor might mail them copies of the decision, but that "if there is any *final* decision from the *Court* (which is what really counts), you will get it *directly* from us." Mr. Zola also advised that,

> If, in the interim, you hear from *anybody* that AAACon has been "put out of business", or is about to "go under," you may assure them that we intend to be here at the same stand, day in, day out, week in, week out, for years, and that nothing has changed.

Regarding the Commission proceedings against AAACon, Mr. Zola stated that "these proceedings are annoying. However, we will not only live with them, but *WE WILL THRIVE."* Also in the memo, Mr. Zola reminded the recipients of an upcoming convention to be held in Saddle Brook, NJ. (Office managers and agents had been advised of the convention by a memo dated July 3, 1984.)

Sometime during the summer of 1984, Mr. Zola entered into negotiations to purchase the stock of NATCO from its owner, Pinnie Oliver. At the time NATCO was operationally defunct, and its only assets were its ICC licenses. As pertinent here, its Certificate No. MC-162160 (Sub-No. 3) embraces the authority to transport motor vehicles, in truck-away or drive-away service, between all points in the contiguous United States. Mr. Zola first entered into a purchase agreement with Ms. Oliver, on September 21, 1984, under the corporate name Watermill Corp. Among other things, the purchase agreement provided that the corporate name would be changed from

NATCO and start operating it immediately upon expiration of AAACon's operating rights.

On October 1, 1984, Mr. Zola's law firm forwarded Mr. Zola's personal check in the amount of the purchase price of $12,000 made payable to Ms. Oliver's representatives. Thereafter, in early October 1984, Ms. Oliver received new documents from Zola's law firm, which included a purchase agreement, addendum, and bill of sale reflecting Mr. Zola, not Watermill, as the purchaser of NATCO.

On September 22 and 23, 1984 (immediately after Mr. Zola's execution of a purchase agreement for the NATCO stock), the convention of AAACon agents and AAACon company office managers was held in Saddle Brook, NJ.[5] At the convention, Mr. Zola, along with AAACon's operations manager, Harvey Blackman, discussed the manner in which operations were going to continue after October 8, 1984. While the AAACon agents apparently were not given all the facts surrounding the ICC proceeding, Mr. Zola told them that changes were going to be made, because "it no longer paid for us to continue as AAACon." The agents were assured, however, that they would not be adversely affected.

Mr. Zola told them that "Caravan Corp. will be issuing new agency agreements. The intent of the agreements, I can tell you right now, will be to put you in the same position you were under AAACon's operation, with zero changes." Mr. Zola emphasized, "You are going to end up on October 8th where you are on October 7th." The intention to continue operations was made clear: "On October 8th, Auto Caravan shall, like Phoenix, arise from

5. A number of attendees tape recorded the meetings. Several witnesses appearing in this proceeding produced their tapes, the tapes were played, and transcripts were admitted into evidence. It thus is irrefutable that Mr. Zola made the statements attributed to him.

the ashes, and there is no way to stop it." Mr. Zola further advised that, "I think clearly you can see now that we are not going to be stopped. We are going ahead, that there is a little bit of inconvenience in this, but really nothing major."

Regarding the manner of conducting business on and after October 8, the attendees were advised that:

The tariffs, charges, and the contract terms, with a very, very few technical exceptions that I don't even think most will notice, will be exactly the same as those now used by AAACon ***. You will hardly even notice the difference in the forms except the name itself.

Mr. Zola reiterated that "As of October 8th, the AAACon tariff will be applicable to the movements by Auto Caravan."

Mr. Zola noted the importance of keeping the AAACon telephone numbers, in view of the large proportion of automobile drive-away business that is military business gained through referrals. "They refer you by the phone number," Mr. Zola advised. "Don't forget," he added, "the phone numbers are staying the same. That is the key here. If the phone numbers were changing, we perhaps would have a great deal of difficulty." Mr. Zola further noted that "When they call up from the military base, they are going to call up for AAACon, but they are going to get the literature of Auto Caravan." Mr. Zola discussed the manner in which a position at the tope of telephone listings could be maintained. He suggested placing A's or "A-1-A" in front of Auto Caravan's name.

Newspaper advertising also was discussed at the convention. The agents were advised (apparently by Mr. Blackman):

Well, you are not going to change your copy and you are not going to reduce your lines, so if you simply remove the name "AAACon" and put "Auto Caravan," I don't see where it should be a problem. We are going to be doing that in all the

major cities where we place the advertising in the newspapers as well.

Also at the convention, there was considerable discussion of the manner in which agents and office managers should handle inquiries about AAACon. Mr. Zola recommended evasive answers. At one point he suggested telling questioners that "AAACon is still in business, but we have gotten *** greater authority and an easier-to-pronounce name." Later, however, Mr. Zola advised, "The only thing I don't want you to do is tell them this is the same corporate entity." He suggested that customers be told: "We used to be with AAACon, not we used to be AAACon, but we used to be with AAACon. We found a name that is easier to spell. We bought greater authority."

After the convention, on October 2, 1984, Mr. Zola sent a memorandum to all AAACon offices advising of actions that should be taken and changes that were to be made as of October 8. Agents were informed that they soon would be receiving new agency agreements with North American [NATCO] as well as new tariffs, and that the new tariff and agency provisions would closely match those of AAACon. As he had done previously, Mr. Zola also gave instructions on how to respond to inquiries regarding AAACon. Customers were to be advised, *inter alia,* that Auto Caravan had the same insurance and contract terms as AAACon. In response to questions about AAACon, the agents and office managers were to state that they "used to work for AAACon, this is now Auto Caravan—a new corporate entity." Persistent questioners were to be referred to Mr. Zola or Mr. Blackman. Mr. Zola emphasized that it should never be said merely that AAACon had changed its name.

Sometime in October 1984, Mr. Zola, through his law firm, filed the articles of incorporation for Auto Caravan, listing Mr. Zola as the sole director of that entity.

In order to facilitate the uninterrupted continuance of

operations, Mr. Zola arranged for a tariff filing in NATCO's name prior to the revocation of AAACon's authority. Pinnie Oliver, NATCO's former owner, was listed as president in the filing. AAACon's employee in charge of tariff filing worked on the NATCO tariff prior to the end of September 1984. The Commission twice rejected NATCO tariffs, in late October and early November 1984, in part because the tariffs attempted to incorporate sections of the inoperative AAACon tariff.

As planned, under Mr. Zola's control the AAACon operation continued uninterrupted after October 7, 1984. Harvey Blackman, who had been AAACon's operations manager, continued as NATCO/Auto Caravan operations manager. He testified that, on October 8, the operations were basically the same as they had been on October 7, except for a different name.

An important account for Mr. Zola and AAACon had been Winnebago, a major manufacturer of motor homes. AAACon had begun serving Winnebago in 1982, under the name Caravan Co., and the same business was continued by NATCO/Auto Caravan after October 8, 1984, also under the name Caravan Co., using the same freight bills as had been used previously. Before October 8, Caravan Co. had been a subsidiary of AAACon, using AAACon's operating authority. Caravan Co.'s name and address remained the same under both AAACon and NATCO/Auto Caravan. William Catalioto, AAACon's vice president and national sales manager between March 1981 and October 1984, testified that, after the Commission's August 7, 1984, revocation decision was issued, he and Mr. Zola went to Forest City, IA, to reassure Winnebago officials that there would be no interruption of service after AAACon's authority was revoked. (Although Mr. Catalioto left AAACon prior to October 8, 1984, he knew of no interruption of service for the Winnebago account.) The evidence of record suggests that Mr. Zola's service for Winnebago indeed continued without interruption.

AAACon had conducted its operations through a network of company offices and agency offices situated in major cities throughout the continental United States. Documentary evidence shows that NATCO/Auto Caravan conducted operations in the same way. A February 5, 1982, company list shows 11 AAACon company offices and 54 AAACon agency office locations. An October 8, 1984, company list shows 11 Auto Caravan company offices and 43 Auto Caravan agency office locations. Ten of the Auto Caravan company offices were situated in the same cities in which AAACon offices had been located. Of the 10, only one had a different address, telephone number, and manager. Thirty-seven of the 43 Auto Caravan agency offices were situated in cities where AAACon had maintained office locations. Twenty-seven of the Auto Caravan agency offices had the same address, telephone number, or agent as had the AAACon agency offices.[6]

Among the AAACon agents who stayed on with NATCO/Auto Caravan for a time was Stephen Walter, who served in Washington, DC, until February 1985. Mr. Walter testified that there were no changes in the business or in his operations as an agent after October 8, 1984, except in the manner in which the telephone was answered. Mr. Walter's office used the AAACon tariff to rate shipments into early December 1984.

Larry Gilman, an AAACon agent in Houston, TX, also stayed on with NATCO/Auto Caravan for a short time. He testified that his operations were no different, other than with respect to changes of paper, after the revocation of AAACon's authority. Mr. Gilman's office

6. The oral testimony contained slightly different numbers from those in the documentary evidence, but the variances are insigificant.

also continued to use the AAACon tariff to rate shipments after October 8, 1984.

Michael Albertolle, who was employed by AAACon as its San Francisco office manager from the spring of 1969 until late December 1984, testified that the only office procedure that was changed was the method of answering the telephone. When callers inquired as to whether the company was AAACon, the procedure was to advise callers that the organization's name had been changed.

Donald Dean was employed by AAACon in its Elkhart, IN, office as the regional manager from August 1983 until October 7, 1984, and then by NATCO in the same capacity from October 8, 1984, until July 1985. Mr. Dean stated that the operations of the office did not change in any manner or form after October 8, 1984.

Robert Owens was employed by Auto Caravan as its San Francisco office manager between June and October 1986, some 2 years after the revocation of AAACon's authority. After receiving telephone calls for AAACon, Mr. Owens made inquiries and was given the following information by Mary Cole, Auto Caravan's New York manager: AAACon was their company; AAACon had some problems with the Federal government; AAACon is still in business; and he should take the calls that come in for AAACon. Mr. Owens also was advised by Mr. Blackman that AAACon and Auto Caravan were the same company; that they had simply segued from one to the other; that AAACon had some problems; and that they had made a name change. When Mr. Owens broached the subject of AAACon with Mr. Zola, he was told essentially the same thing.

In an apparent attempt to arrest a defection of agents, and to assure that AAACon telephone numbers were not lost to former agents, AAACon, NATCO/Auto Caravan, and Mr. Zola's law firm instituted lawsuits against a

number of AAACon agents. Mr. Walter was sued by AAACon and the respondents for $2.9 million a few months after he was fired in April 1985. Mr. Walter testified that every agent with whom he came in contact who had left AAACon or NATCO/Auto Caravan was the subject of a lawsuit.

Mr. Gilman was sued for some $700,000 after he stopped acting as an agent for NATCO/Auto Caravan. Mr. Gilman had not wanted to sign an agency agreement with NATCO/Auto Caravan, but he had felt forced to do so because AAACon owed him money. Mr. Gilman indicated that his telephone number was an issue in the lawsuit against him.

Eunice Taylor, AAACon's Minneapolis agent beginning in March 1969, did not sign an agency agreement with NATCO, but rather sought her own authority. Her agency agreement with AAACon had contained an addendum that provided that, in the event AAACon's authority was either suspended or revoked by the Commission, she would have the right to make an application for operating authority. However, AAACon and NATCO, as assignee of AAACon, sued Ms. Taylor for $450,000. The AAACon telephone listing was a major aspect of the dispute.

Charles H. Lovegrove, who had been an AAACon agent in Palm Springs and Santa Anna, CA, beginning in February 1973, severed his relationship with AAACon in the latter part of October 1984 and went to work for another carrier. He never signed an agency agreement with NATCO/Auto Caravan. AAACon, NATCO, and Auto Caravan filed suit against Mr. Lovegrove and his wife, seeking damages in excess of $10,000. When he spoke with Mr. Zola's counsel, Mr. Lovegrove determined that all that was wanted was Mr. Lovegrove's telephone number, which happened to be his residential phone number.

George P. Smith was AAACon's agent in Phoenix,

AZ, between mid-December 1979 and October 8, 1984. Mr. Smith allowed AAACon and NATCO/Auto Caravan to make arrangements directly with the telephone company concerning the take-over of his telephone number. Thereafter, Mr. Smith was sued by AAACon, NATCO, and Auto Caravan.

DISCUSSION AND CONCLUSIONS

In their appeals, respondents allege a large number of errors of fact and law.[7] However, they can be reduced to three basic areas of contention in the appeals. We address each of these three areas below.

Import of the Commission's 1984 revocation decision. Respondents' basic position in this proceeding is that the Commission's 1984 decision merely revoked AAACon's certificates, but did not direct AAACon or any of the respondents to do, or to refrain from doing, anything further. Respondents rely on the absence of any express language in that decision specifically prohibiting AAACon or Mr. Zola from lawfully acquiring a certificated carrier or from engaging in any lawful business. Respondents argue that the Commission cannot now turn the revocation decision into an injunction against Mr. Zola's purchase of the stock of a licensed carrier.

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7. Many of their assignments of error are interrelated, and some of their arguments are repetitive. The bases for some of respondents' arguments are mischaracterizations of the facts. For instance, respondents state, "In September 1986, this Commission commenced the instant proceeding stating that there was 'reason to believe' that respondents were continuing 'the abusive and fraudulent AAACon' practices and policies." The Commission made no such statement; OCCA conducted no investigation into NATCO/Auto Caravan's treatment of consumers; the matter was never in issue in this proceeding; and the ALJ properly declined to accept evidence concerning that matter.

However, the revocation of AAACon's operating authority was not merely a formalistic action. It was intended as a severe, final sanction warranted by the egregious violations of the agency's order directing AAACon to cease and desist from committing specified deceptive, abusive, and unlawful practices. The clear purpose and import of the revocation order was to permanently terminate the AAACon operations. Upon finding that those operations have not been terminated, but have continued under a new corporate shell created for the purpose of allowing continued operations, the Commission is authorized to fashion a further, appropriate remedy. 49 U.S.C. §10321(a); *see, infra* at 24-29; *Mattes v. United States,* 721 F.2d 1125 (7th Cir. 1983). In order to ensure that those operations are finally halted, we believe that an injunctive-type order against Mr. Zola is now both warranted and proper under the statute.

Continuation of operations. As the evidence outlined above makes crystal clear, the AAACon operations did not miss a beat when the revocation order became effective, but continued as the same operation (under a different name only). The AAACon-NATCO operations manager testified that the operations were the same the day after the revocation as the day before the revocation. With minor differences the roster of NATCO agencies was the same as the roster of AAACon agents from 1982. (To the extent recalcitrant agents and employees were to make the transition more difficult, they were to face legal action at the hands of Mr. Zola.) The evidence here that NATCO's operations are a continuation of AAACon's operations is, like the evidence of violations of the *AAACon I v. ICC, supra,* 792 F.2d at 1160. So too is the evidence concerning Mr. Zola's role in this scheme. Mr. Zola advised his agents and employees to assure skeptics that "we intend to be here at the same stand, day in, day out, week in, week out, for years, and that nothing has changed." His

intention to evade the Commission's order is evident in his boast to them that the operations would continue despite the Commission's "annoying" proceedings.

Respondents assert that Mr. Zola's proposed purchase of the NATCO stock was fully disclosed to, reviewed by, and approved by independent counsel. This suggests no more than that Mr. Zola's purchase of NATCO's stock in and of itself may have been lawful,[8] had it not formed the basis of a scheme for subverting the Commission's revocation order. We need not consider to what extent good faith reliance upon the advice of counsel could be a mitigating factor, since we find that Mr. Zola well understood—independent of legal advice—the import of our prior decision. Mr. Zola's understanding is evident in his efforts to find a loophole through which to continue AAACon's operations and his instructions to agents and employees designed to conceal those continuing operations.

In any event, we note that the record does not show that Mr. Zola's *entire plan* was made known to and approved by any *independent* counsel. The attorneys who testified on behalf of respondents had been employed by either AAACon, Mr. Zola, or NATCO and had represented AAACon, Mr. Zola, or NATCO before the Commission either in the previous AAACon proceedings

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8. Commission approval is not required to acquire control of a carrier unless the person acquiring control already controls another carrier. *See* 49 U.S.C. §11343-11344. Mr. Zola acquired control of NATCO on October 8, 1984, the day after AAACon's authority was revoked. Had the transaction taken place prior to the revocation of the AAACon authority revocation, it would have required advance Commission authorization under §11343.

or in these proceedings. Further, respondents cite the testimony of a single attorney, Morton Kiel, corroborating assertions that the basic elements of the planned stock purchase *and* operation had been reviewed and approved by counsel. Mr. Kiel, however, represented AAACon for more than 10 years, and he is a personal friend of Mr. Zola and the Zola family. He cannot properly be characterized as *independent* counsel.

Respondents contend that the ALJ mischaracterized Mr. Zola's statements at the September 1984 convention and failed to fully consider the October 2, 1984, directive that followed. They portray Mr. Zola's convention remarks as "trial balloons" and cite several assertedly exculpatory statements made by Mr. Zola after he made the convention statements. Respondents cite portions of the October 2, 1984, memo allegedly "revoking" the oral statements quoted in the initial decision (by instructing the agents that they never should inform customers that MATCO was merely a change of name and that they should make it clear that NATCO is a different company from AAACon).

We see little, if any, inconsistency in the statements quoted by the ALJ and those relied on by respondents. They all were addressed to *AAACon employees and agents* and they all concerned the manner in which *operations were to be continued after October 7, 1984.* Mr. Zola's ultimate instructions to agents regarding the elimination of the AAACon name and the distinguishing of NATCO from AAACon, whether made orally or in the writted directive, are all consistent with furtherance of a scheme to evade the Commission's revocation decision.

Respondents also object to the ALJ's discussion of their lawsuits against former AAACon agents. Respondents assert that the litigation is not the proper concern of the Commission, and that in none of the cases did respondents receive an unfavorable court judgment.

Respondents denigrate the value of the testimony of the "disgruntled individuals" who were sued.

The ALJ properly found that the ultimate merits of those lawsuits are not a matter for consideration in this proceeding. Nevertheless, the testimony of the former agents and employees is instructive in the light it sheds on Mr. Zola's course of actaion. Whatever other purposes the lawsuits might serve, they did tend to perpetuate the AAACon operations. If the existence of such lawsuits could protect himself from ad erse probative evidence merely by instituting legal action against those most knowledgeable about the events in question. The credibility of the witness, in light of those lawsuits, was a matter to be judged by the presiding ALJ, who obviously found their tesitmony to be credible and probative.

Respondents argue also that the ALJ erred in suggesting that respondents continued AAACon advertising. Respondents cite testimony demonstrating a thorough and methodical undertaking by respondents to cancel all AAACon telephone advertisements. Respondents add that the few AAACon newspaper advertisements that appeared after October 8, 1984, were run contrary to written company directives.

We do not dispute that the AAACon advertisements and telephone listings that appeared after the revocation of AAACon's operating authority were the results of oversights. Indded the ALJ found that "Zola and his staff did inaugurate an extended and essentially successful campaign to cease the use of the AAACon name." Initial decision at 9. Overt AAACon advertising would have been a patent violation of the Commission's revocation order.

Respondents further argue that the ALJ erred in failing to consider evidence that respondents reduced significantly the consumer drive-away business that had been the cornerstone of AAACon's operation (as well as the source of its consumer abuse complaints).

Respondents avow that, during the first year of their operation, their business was changed by their officers and became overwhelmingly industrial-corporate in nature.

This does not demonstrate that NATCO/Auto Caravan is separate and apart from, not a continuation of, AAACon. We agree with the ALJ that the increase in the percentage of commercial customers "is scarcely relevant to the [use] of NATCO under Zola's control." Initial decision at 13-14.

Respondents argue that the record contains no evidence that they have engaged in any of the condemned anti-consumer activities or policies of AAACon.[9] They thus assert that there is no support for the assertedly "central" finding of the ALJ that respondents continued the "nefarious AAACon enterprise."

The question here is not whether the on-going operations violate the 1976 cease and desist order. The commission already found that AAACon had willfully and repeated violated that order and, based on that finding, we revoked AAACon's authority. The question now is whether the operations were continued in violation of the 1984 revocation decision.On the record, that question clearly must be answered in the affirmative.

Imposition of sanctions. The AAACon case has been a truly exceptional one for this agency. At first it was exceptional in the degree to which AAACon, under Mr. Zola's control, abused consumers, before and throughout the more than 13 years that it took from the time that the ICC's investigation and revocation proceedings were instituted tot eh time that the AAACon authority was finally

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9. It is unclear whether respondents through this argument attempts to distinguish NATCO/Auto Caravan from AAACon or to gain leniency here.

revoked. Now it is exceptional in the lenghts to hich Mr. Zola (and the organizations though which he has operated) have gone to flout the authority of this agency and undermine the integrity of its orders. Under the circumstances of this case, we would be remiss if we did not take all necessary action to ensure that our orders are make effective.

In formulating a response to evils and abuses in the transportation industry, the Comission is not limited to specific statutory authorizations. The Interstate Commerce Act expressly provides that "[e]numeration of a power of the Commission may have in carrying out this subtitle. "49 U.S.C.§10321(a). *See, e.g., ICC v. American Trucking Assns, Inc.,* 467 U.S. 354, 365 (1984)(Commission's authority extends beyond the specific provisions of the statute to those actions which further a statutory mandate); *Trans Alaska Pipeline Cases,* 436 U.S. 631, 655 (1978)(Commission has powers "adjunct" to enumerated powers). *See also United States v. Chesapeake & Ohio R. Co.,* 426 U.S. 500, 513-514 (1976) Acting under its implied powers the Commission can formulate orders that are tailored to the particular circumstances). Implied powers may be properly invoked not merely to punish transgressors but also to protect the integrity of the agency's processes. *Cf. Amoskeag Co. v. ICC,* 590 F.2d 388, 392-93 (5th Cir. 1979)(Cease and desist order against a railroad's purchase of stock in another railroad upheld despote absence of an explicit grant of statutory authority where order necessary for ICC to protect the integrity of its jurisdiction); *Greater Boston Television Corporation v. FCC,* 463 F.2d 268, 291 (D.C. Cir.),*cert. denied,* 406 U.S. 950 (1972)(extraordinary agency action may be necessary and appropriate to "avoid an unconscionable injustice growing out of misconduct undercutting the integrity of the administrative or judicial process."). Here we firmly believe that the actions we are taking are adjunct to our

enumerated powers and are necessary to further a specific statutory mandate—protection of the integrity of the administrative process.[10]

We reject respondents' position that the Commission lacks implied authority in his own name.[11] The entry of a

10. The remedy we are providing here is similar to that upheld in *Mattes v. United States,* 721 F.2d 1125 (7th Cir. 1983) (although statute-based grounds for denial of application did not include preventing circumvention of an order, agency could do so in order to effect the remedial goals of the statute). As in *Mattes, supra,* in enacting provisions permitting the Commission to revoke operating authority, Congress could not have intended to deprive the ICC of the power to make its revocation decisions effective. "The suspension power by necessary implication incorporates the authority to proceed against circumvention even in the absence of a specific rule on the subject." *Id.* at 1132.

11. Respondents argue that because 49 U.S.C. §10934(c), recently enacted, gives the Commission authority to prohibit the transportation activities of household goods agents, there is no implied power of debarment under 49 U.S.C. §§10321, 10925, or 11701. But the recent enactment of extensive, specific directives for the regulation of household goods agents, 49 U.S.C. §10934, cannot diminish our general autnority to proceed under a more comprehensive provision, §10321(a), against individuals who are not household goods agents.

Respondents also contend that recent legislation which added freight forwarders to the list of entities against whom the commission could bring proceedings under §11701(a), would have been unnecessary if that section covers "all persons." But that action merely affirms and accentuates the fact that freight forwarders were not totally deregulated.

Respondents further contend that the Commission may not find implied authority to proceed against individuals because in 1978 Congress repealed section 2 of the Elkins Act, 49 U.S.C. §42, which had given the Commission specific authority to include as parties in any proceeding, "in addition to the carrier, all persons interested in or affected by the * * * practice under consideration." However, the elimination of that particular language was merely part of the general recodification of the Interstate Commerce Act, which specifically disclaimed any intent to work any substantive changes to any statute. Act of October 17, 1978, section 3(a), Pub. L. 95-473, 92 Stat. 1466 (1978); *Trailer Marine Transport Corp. v. FMC,* 602 F.2d 379, 383, n.18 (D.C. Cir. 1979).

cease and desist order directed against the individual responsible for the management, direction, and control of the activities of a corporation is proper when it appears that an order limited in its application only to the corporation would prove futile. *See Sebastopol Meat Company v. Secretary of Agriculture,* 440 F.2d 983, 985 (9th Cir. 1971). [12]

Respondents contend that Mr. Zola is being foreclosed from engaging in he transportation industry without having been a party to any proceeding in which he was charged with wrongdoing. This argument overlooks the obvious. It is here in *this proceeding* that Mr. Zola has been charged with devising and putting into effect a scheme for evading an order of the Commission.[13] Mr.

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[12]. In light of the teachings of the Supreme Court in *ICC v. American Trucking Assns, Inc., supra,* and *Trans Alaska Pipeline Cases, supra,* we do not believe *Wallach v. S.E.C.,* 202 F.2d 462 (D.C. Cir. 1953), relied on by respondents, precludes our action here.

13. Respondents contend that OCCA failed to comply with the provisions of the Administrative Procedure Act (APA) at 5 U.S.C. §554(b) requiring the Commission to inform respondents of the legal authority and jurisdiction claimed and the matters of fact and law asserted. (Respondents also cite 5 U.S.C. §558, but as noted, notice has been given many times over and no real attempts at compliance have been made.) This position is without merit. In addition to the order instituting this proceeding, respondents were provided with an extensive APA letter, dated October 10, 1986, detailing the facts, information, evidence, and documents that OCCA would present during the course of the hearings. Subsequently, OCCA presented its case first, and respondents took advantage of a two-month recess before presenting their case. Respondents were given a full and fair hearing founded on ample notice.

In any event, it is well settled that technical flaws in a notice can be cured if the actual conduct of the administrative proceedings provides notice to the participants of that which is under consideration. *National Steel & Shipbuilding Co. v. Director, Office of Workers'*

Zola has also been charged with a direct violation of the revocation decision which, by obvious implication, ordered AAACon to cease operations. It is well-settled that a command to a corporation is, in effect, a command to those who are officially responsible for the conduct of its affairs. "If they***prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience***." *Wilson v. United States,* 221 U.S. 361, 377 (1911). *See Mattes, supra,* 721 F.2d at 1132 (applicant's "lack of participation in the violations of the [statute] is irrelevant to whether her registration is an attempt to circumvent the suspension order.") In any event, all the evidence points to the fact that Mr. Zola was the *alter ego* of AAACon, and he is now the *alter ego* of NATCO/Auto Caravan.

There is no question in our minds that NATCO/Auto Caravan and Mr. Zola willfully violated the Commission's decision revoking AAACon's authority.[14] The actions

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Compensation Programs, 616 F.2d 420, 421 (9th Cir. 1980), and cases cited therein. Thus, even had there been flawed notice here, any inadequacy would have been amply remedied by the notice afforded respondents during the proceedings. *Cf., AAACon Auto Transport, Inc. v. ICC,* 792 F.2d 1156, 1163 (D.C. Cir. 1986), and cases cited therein.

14. Willfulness can be found if a person "(1) intentionally does an act which is prohibited—irrespective of evil motive or reliance on erroneous advice, or (2) acts with careless disregard of statutory requirements." *Lawrenc e v. Commodity Futures Trading Com'n,* 759 F.2d 767, 773 (9th Cir. 1985).

constituting an evasion of the Commission's decision were intentional and, at the very least, were carried out with indifference to legal requirements. *See Lawrence v. Commodity Futures Trading Com'n,* 759 F.2d 767-773, and *Schreiber-Invest. of Opers. & Revoc. of Certifs.,* 125 M.C.C. 532, 564 (1976), and cases cited therin.

We turn, then, to the appropriate sanctions to be applied in this situation. The landmark decision in *Gilbertville Trucking Co. v. United States,* 371 U.S. 115, 130 (1962), recognized the authority of agencies to impose drastic remedies to expunge violations, subject only to the interests of private parties or the general public." The Supreme Court recognized the importance of allowing the agency to choose the remedy and "to tailor the remedy to the particular facts of each case so as to best effectuate the remedial objectives***." *Id. See also Querner Truck Lines, Inc.—Investigation,* 100 M.C.C. 215, 220 (1965).

Here, we have considered Mr. Zola's central role and responsibility in the consumer fraud and abuse perpetrated by AAACon, in that carrier's repeated willful violations of our earlier cease and desist order, and in the scheme to evade and circumvent our revocation order. Given his record of abuses and total disregard for the Commission's regulatory authority, we believe that it is necessary and appropriate to now require Mr. Zola to cease and desist from engaging in *any* for-hire transportation activities within our jurisdiction, as the ALJ has recommended.

It is also necessary and appropriate to revoke NATCO's operating authority. NATCO was operationally defunct when Me. Zola purchased it. Mr. Zola revived NATCO for the sole purpose of subverting the Commission's order requiring that the AAACon operation cease. It is clear on this record the NATCO is nothing more than a continuation of AAACon under a new name and the personal instrument of Mr. Zola. We would be remiss if

we did not take all necessary action to ensure that our orders to AAACon and Mr. Zola are made effective. As the ALJ found, and the record shows, the only effective remedial device is the extinguishment of the Zola/NATCO/Auto Caravan subterfuge. To accomplish this, we issue the cease and desist order indicated above and revoke the NATCO certificate.

Furthermore, Auto Caravan and Caravan Co., as the operating arms of NATCO, are prohibited from conducting interstate for-hire transportation. We admonish respondents that it is our intention to terminate the AAACon operation altogether and the any further efforts to evade the Commission's 1984 revocation decision will be met with immediate enforcement actions.

In sum, we find that the sanctions imposed here represtent an appropriate regulatory response to the facts before us and are in direct furtherance of our affirmative futy to terminate illicit operations, *see Barnes Freight Lines, Inc. v. ICC,* 569 F.2d 912 (5th Cir. 1978), and to protect the integrity of our regulatory processes.

Except as otherwise indicated in this decision. there are no new or material matters of fact or law not adequately considered and properly disposed of by the ALJ in his initial decision. The Commission is not required to make findings on every issue raised by a party where the resolution is not necessary for the ultimate resolution of the proceeding. *See Trailways, Inc. v. ICC,* 676 F.2d 1019, 1022 (5th Cir. 1981). Accordingly, any matters raised by the pleadings and not discussed herin have been considered and found not to warrant specific disposition.

We find:

The findings of the Administrative Law Judge are supplemented as discussed above. The statement of facts, conclusions, and findings of the Administrative Law Judge, as supplemented in this decision, are proper and correct in all material respects and are affirmed and

adopted as our own. The evidence considered in light of the pleadings does not warrant a result different from that reached by the Administrative Law Judge.

This action will not significantly affectly either the quality of the human environment or the conservation of energy recources.

It is ordered:

1. The joint motions of :(1) Auto Caravan Cor-. for leave to file an appeal; and (2) Ralph J. Zola and North American Transpo9rt Co. for leave to file a reply to OCCA's reply and for oral argument are dines and respondents' tendered statement is rejected.

2. The authority held by North American Transport Co. in Nos. MC-162160,(Sub-No.1), issued August 19, 1982, MC-162160 (Sub-No 2), issued April 13, 1984, and MC- 162160 (Sub-No. 3), issued July 9, 1984, is revoked, effective July 30, 1989. In conjunction with this revocation, Auto Caravan and Caravan Co. are prohibited from conducting interstate for-hire transportation.

3. Ralph J. Zola shall cease and desist, and thereafter refrain and abstain from, directly from, directly or indirectly engaging in any transportation activities within the Commission's jurisdiction until further order of the Commission.[15]

4. Ralph J. Zola must comply with the provisions of 49 C.F.R. §1119.1 by informing the Commission by affidavit of his compliance with this decision within 30 days of service of this decision.

5. The statuory effective and compliance date, after which respondents will be held to be in willful violation of the terms of this decision, is fixed as July 30, 1989.

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15. Upon petition from Ralph J. Zola and for good cause shown, the Commission may remove this prohibition in whole or in part upon a finding that it is no longer necessary.

6. This proceeding is discontinued.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andre, Lamboley, and Phillips.

(SEAL)

Noreta R. McGee
Secretary

ORDER OF THE INTERSTATE COMMERCE COMMISSION IN THE *AAACON AUTO TRANSPORT INC.—REVOCATION PROCEEDING* IN MC-C-7287—DECIDED 1984.

Interstate Commerce Commission
Aaacon Auto Transport Inc.—Revocation
No. MC-C-7287

It is ordered:

Respondent's request for oral argument, embraced in its appeal, is denied.

Respondent's motion to waive the requirement for timely filing of petitions is dismissed as moot.

Respondent's motion to strike material in responsive pleadings, and the requests for official notice, embraced in the motion, are denied.

Respondent's motion to have the Commission take official notice of its public complaint files is denied, and the embraced tendered supplemental evidence is rejected.

Respondent's Offer of Settlement is rejected.

Respondent's motion to adduce additional evidence is denied, and the embraced tendered supplemental evidence is rejected.

The petitions for leave to intervene filed by Isidore Gittler, Stephen J. Walter, and Jack Pieper, are denied.

Respondent's motion to dismiss is denied.

Respondent's motion to waive the rule against a reply to a reply is denied, and its tendered reply is rejected.

The tendered motion of the Office of Compliance and Consumer Assistance to strike (reject) the above reply is rejected.

Respondent's authority in No. Mc-125808 (Sub-No. 1), issued December 23, 1966, (Sub-No. 7), issued July 23, 1979, (Sub No. 8X), issued April 20, 1981, and effective June 4, 1981, (Sub-No. 1) (M2), issued August 6, 1981,

and (Sub-No. 1)(M1), issued August 26, 1981, is revoked, effective 60 days from the date of service of this decision.

A copy of this decision will be served upon each of the Councils of the Better Business Bureau, Inc., named in Appendix L to the initial decision served February 28, 1983.

This proceeding is discontinued.

By the Commission, Chairman Taylor, Vice Chairman Andre, Commissioners Sterrett and Gradison.

James H. Bayne
Secretary

(SEAL)

49 U.S. Code

§ 10321. Powers

(a) The Interstate Commerce Commission shall carry out this subtitle. Enumeration of a power of the Commission in this subtitle does not exclude another power the Commission may have in carrying out this subtitle. The Commission may prescribe regulations in carrying out this subtitle.

(b) The Commission may—

(1) inquire into and report on the management of the business of carriers providing, and brokers for, transportation and service subject to this subtitle;

(2) inquire into and report on the management of the business of a person controlling, controlled by, or under common control with those carriers or brokers to the extent that the business of that person is related to the management of the business of that carrier or broker;

(3) obtain from those carriers, brokers, and persons information the Commission decides is necessary to carry out this subtitle; and

(4) consistent with the transportation policy of section 10101 of this title, provide administrative assistance to small motor common carriers of passengers and local governments in preparing for proceedings under sections 10922(c)(2), 10935, and 11501(c) of this title.

(c)(1) The Commission, an individual Commissioner, an employee board, and an employee delegated to act under section 10305 of this title may subpena witnesses and records related to a proceeding of the Commission from any place in the United States, to the designated place of the proceeding. If a witness disobeys a subpena, the Commission, or a party to a proceeding before the Commission, may petition a court of the United States to enforce that subpena.

(2) Subpenas may be signed by a Commissioner, the Secretary of the Commission, or a member of a board when the subpena relates to a matter delegated to the board under section 10305 of this title.

(3) The district courts of the United States have jurisdiction to enforce a subpena issued under this section. Trial is in the district in which the proceeding is conducted. The court may punish a refusal to obey a subpena as a contempt of court.

(d)(1) In a proceeding, the Commission may take the testimony of a witness by deposition and may order the witness to produce records. A party to a proceeding pending before the Commission may take the testimony of a witness by deposition and may require the witness to produce records at any time after a proceeding is at issue on petition and answer.

(2) If a witness fails to be deposed or to produce records under paragraph (1) of this subsection, the Commission may subpena the witness to take a deposition, produce the records, or both.

(3) A deposition may be taken before a judge of a court of the United States, a United States magistrate, a clerk of a district court, or a chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any State, or a notary public who is not counsel or attorney of a party or interested in the proceeding.

(4) Before taking a deposition, reasonable notice must be given in writing by the party or the attorney of that party proposing to take a deposition to the opposing party or the attorney of record of that party, whoever is nearest. The notice shall state the name of the witness and the time and place of taking the deposition.

(5) The testimony of a person deposed under this subsection shall be taken under oath. The person taking the deposition shall prepare, or cause to be prepared, a transcript of the testimony taken. The transcript shall be subscribed by the deponent.

(6) The testimony of a witness who is in a foreign country may be taken by deposition before an officer or person designated by the Commission or agreed on by the parties by written stipulation filed with the Commission. A deposition shall be filed with the Commission promptly.

(e) Each witness summoned before the Commission or whose deposition is taken under this section and the individual taking the

49 U.S. Code

§ 10925. Effective periods of certificates, permits, and licenses

(a) Each certificate, permit, and license issued under section 10922, 10923, or 10924 of this title is effective from the date specified in it and remains in effect except as otherwise provided in this section.

(b) On application of the holder of a certificate, permit, or license, the Interstate Commerce Commission may amend or revoke any part of the certificate, permit, or license. On complaint or on its own initiative and after notice and an opportunity for a proceeding, the Commission may suspend, amend, or revoke any part of a certificate, permit, or license—

(1) if a motor carrier, broker, or household goods freight forwarder, for willful failure to comply with this subtitle, a regulation or order of the Commission, or a condition of its certificate, permit, or license; and

(2) if a water carrier, for willful failure to comply with section 10701(a) or 11101(a) of this title, a regulation or order of the Commission, or a condition of its certificate or permit.

(c)(1) Except on application of the holder, the Commission may revoke a certificate or permit of a motor carrier or household goods freight forwarder, or a license of a broker, only after the Commission has issued an order to the holder under section 11701 of this title requiring compliance with this subtitle, a regulation of the Commission, or a condition of the certificate, permit, or license of the holder, and the holder willfully does not comply with the order.

(2) Except on application of the holder, the Commission may suspend, amend, or revoke a certificate or permit of a water carrier only after the Commission has issued an order to the holder under section 11701 of this title requiring compliance with section 10701(a) or 11101(a) of this title, and the holder willfully does not comply with the order.

(3) The Commission may act under paragraph (1) or (2) of this subsection only after giving the holder of the certificate, permit, or license at least 30 days to comply with the order.

(d)(1) Without regard to subchapter II of chapter 103 of this title and subchapter II of chapter 5 of title 5, the Commission may suspend a certificate or permit of a motor carrier, a permit of a household goods freight forwarder, or a license of a broker—

(A) if a motor carrier or broker, for failure to comply with section 10701, 10702, 10761, 10762, 10924(c), or 10927(b) or (d) of this title, or an order or regulation of the Commission prescribed under those sections; and

(B) if a household goods freight forwarder, for failure to comply with section 10762 or 10927(c) or (d) of this title, or an order or regulation of the Commission prescribed under those sections.

(2) Without regard to subchapter II of chapter 103 of this title and subchapter II of chapter 5 of title 5, upon petition by the Secretary of Transportation, the Commission may suspend a certificate or permit of a motor carrier of passengers if the Commission finds that such carrier has been conducting unsafe operations which are an imminent hazard to public health or property.

(3) The Commission may suspend the certificate, permit, or license only after it gives notice of the suspension to the holder at least 15 days before the date the suspension is to begin. The suspension remains in effect until the holder complies with those applicable sections or, in the case of a suspension under paragraph (2) of this subsection, until the Commission revokes such suspension.

(c)(1) On application of a motor contract carrier who holds a permit issued under section 10923 of this title, or on complaint of a competing motor common carrier who holds a certificate under section 10922 of this title, or on its own initiative, if the Commission, after notice and an opportunity for a proceeding, determines that the operations under the permit or any part thereof—

(A) do not conform with the operations of a motor contract carrier; and

(B) are those of a motor common carrier;

the Commission may amend or revoke such permit or part thereof to conform the operations under such permit or part thereof to the operations of a motor contract carrier.

(2) The Commission may issue in place of any permit or part thereof revoked under this subsection a certificate under section 10922 of this title which authorizes the holder of such certificate to provide as a motor common carrier the same type of transportation between the same points or within the same territory as authorized in the permit or part thereof.

49 U.S. Code

§ 10934. Household goods agents

(a) Each motor common carrier providing transportation of household goods subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title shall be responsible for all acts or omissions of any of its agents which relate to the performance of household goods transportation services (including accessorial or terminal services) subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title and which are within the actual or apparent authority of the agent from the carrier or which are ratified by the carrier.

(b) Each motor common carrier providing transportation of household goods subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title shall use due diligence and reasonable care in selecting and maintaining agents who are sufficiently knowledgeable, fit, willing, and able to provide adequate household goods transportation services (including accessorial and terminal services) and to fulfill the obligations imposed upon them by this subtitle and by such carrier.

(c)(1) Whenever the Commission has reason to believe from a complaint or investigation that an agent providing household goods transportation services (including accessorial and terminal services) under the authority of a motor common carrier providing transportation of household goods subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title has violated section 11901(k) or 11917 of this title or is consistently not fit, willing, and able to provide adequate household goods transportation services (including accessorial and terminal services), it may issue to such agent a complaint stating the charges and containing notice of the time and place of a hearing which shall be held no later than 60 days after service of the complaint to such agent.

(2) Such agent shall have the right to appear at such hearing and rebut the charges contained in the complaint.

(3) If such person does not appear at the hearing or if the Commission finds that the agent has violated section 11901(k) or 11917 of this title or is consistently not fit, willing, and able to provide adequate household goods transportation services (including accessorial and terminal services), it may issue an order to compel compliance with the requirement that the agent be fit,

(49 U.S. Code Sec. 10934 cont.)
willing, and able. Thereafter, the Commission may issue an order to limit, condition, or prohibit such agent from any involvement in the transportation or provision of services incidental to the transportation of household goods subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title if, after notice and an opportunity for a hearing, it finds that such agent, within a reasonable time after the date of issuance of a compliance order under this section, but in no event less than 30 days after such date of issuance, has willfully failed to comply with such order.

(4) Upon filing of a petition with the Commission by an agent who is the subject of an order issued pursuant to the second sentence of paragraph (3) of this subsection and after notice, a hearing shall be held with an opportunity to be heard. At such hearing, a determination shall be made whether the order issued pursuant to paragraph (3) of this subsection should be rescinded.

(5) Any agent adversely affected or aggrieved by an order of the Commission issued under this subsection may seek relief in the appropriate United States court of appeals as provided by and in the manner prescribed in chapter 158 of title 28, United States Code.

(d) The antitrust laws, as defined in the first section of the Clayton Act (15 U.S.C. 12), do not apply to discussions or agreements between a motor common carrier providing transportation of household goods subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title and its agents (whether or not an agent is also a carrier) related solely to (1) rates for the transportation of household goods under the authority of the principal carrier, (2) accessorial, terminal, storage, or other charges for services incidental to the transportation of household goods transported under the authority of the principal carrier, (3) allowances relating to transportation of household goods under the authority of the principal carrier, and (4) ownership of a motor common carrier providing transportation of household goods subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title by an agent or membership on the board of directors of any such motor common carrier by an agent.

49 U.S. Code

§ 11701. General authority

(a) The Interstate Commerce Commission may begin an investigation under this subtitle on its own initiative or on complaint. If the Commission finds that a carrier, broker or freight forwarder is violating this subtitle, the Commission shall take appropriate action to compel compliance with this subtitle. If the Commission finds that a motor private carrier is violating section 10530 of this subtitle, the Commission shall take appropriate action to compel compliance with such section. The Commission may take that action only after giving the carrier, broker or freight forwarder notice of the investigation and an opportunity for a proceeding.

(b) A person, including a governmental authority, may file with the Commission a complaint about a violation of this subtitle by a carrier providing, or broker for, transportation or service subject to the jurisdiction of the Commission under this subtitle or a motor carrier or motor private carrier providing transportation under a certificate of registration issued under section 10530 of this title, or freight forwarder. The complaint must state the facts that are the subject of the violation and, if it is against a water carrier, must be made under oath. The Commission may dismiss a complaint it determines does not state reasonable grounds for investigation and action. However, the Commission may not dismiss a complaint made against a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title because of the absence of direct damage to the complainant.

(c) A formal investigative proceeding begun by the Commission under subsection (a) of this section is dismissed automatically unless it is concluded by the Commission with administrative finality by the end of the 3d year after the date on which it was begun.

49 U.S. Code

§ 11702. Enforcement by the Interstate Commerce Commission

(a) The Interstate Commerce Commission may bring a civil action—

(1) to enjoin a rail carrier from violating section 10901–10907 or 10933 of this title, or a regulation prescribed or certificate issued under any of those sections;

(2) to enforce section 10527 or 10930 or 11109 or 11111 or 11323 of this title, or subchapter III of chapter 113 of this title and to compel compliance with the order of the Commission under any of those sections and that subchapter;

(3) to enforce an order of the Commission, except a civil action to enforce an order for the payment of money, when it is violated by a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title;

(4) to enforce this subtitle (except a civil action under a provision of this subtitle governing the reasonableness and discriminatory character of rates), or a regulation or order of the Commission or a certificate or permit issued under this subtitle when violated by a motor carrier or broker providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title or by a motor carrier or motor private carrier providing transportation under a certificate of registration issued under section 10530 of this title;

(5) to enforce this subtitle (except a civil action under a provision of this subtitle governing the reasonableness and discriminatory character of rates), or a regulation or order of the Commission or a certificate or permit issued under this subtitle, except a civil action to enforce an order for the payment of money, when violated by a carrier providing transportation subject to the jurisdiction of the Commission under subchapter III of chapter 105 of this title; and

(6) to enforce this subtitle, or a regulation or order of the Commission or permit issued under this subtitle when violated by a carrier providing service subject to the jurisdiction of the Commission under subchapter IV of chapter 105 of this title.

(b) In a civil action under subsection (a)(4) of this section—

(1) trial is in the judicial district in which the motor carrier or broker operates;

(2) process may be served without regard to the territorial limits of the district or of the State in which the action is instituted; and

(3) a person participating with a carrier or broker in a violation may be joined in the civil action without regard to the residence of the person.

49 U.S. Code

§ 11703. Enforcement by the Attorney General

(a) The Attorney General may, and on request of the Interstate Commerce Commission shall, bring court proceedings to enforce this subtitle or a regulation or order of the Commission or certificate or permit issued under this subtitle and to prosecute a person violating this subtitle or a regulation or order of the Commission or certificate or permit issued under this subtitle.

(b) The United States Government may bring a civil action on behalf of a person to compel a common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title to provide that transportation or service to that person in compliance with this subtitle at the same rate charged, or on conditions as favorable as those given by the carrier, for like traffic under similar conditions to another person.

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STATE OF NEW YORK)
COUNTY OF RICHMOND)

RICHARD BAILEY, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, is an employee of Dick Bailey Service, Inc., Staten Island, New York.

That on March 19, 1990, he served 3 copy(ies) of the annexed Petition

in Zola v. Interstate Commerce

upon

General Council, Interstate Commerce Commission
12th and Constitution Ave. N.W.
Washington, DC 20423

Solictor General
US Department Justice
Washington, DC

the address(es) designated by said attorney(s) for that purpose by depositing 3 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

RICHARD BAILEY

Sworn to before me this
19 day of March, 1990

WILLIAM BAILEY
Notary Public, State of New York
No. 43-4661518
Qualified in Richmond County
Commission Expires May 31, 1991

Supreme Court, U.S.
FILED
MAR 29 1990
JOSEPH F. SPANIOL, JR
CLERK

No. 89-1494

In The
Supreme Court of the United States
October Term, 1989

RALPH J. ZOLA,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI

SUPPLEMENTAL BRIEF AND APPENDIX

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Decision in *M. Bulifant Trucking, Inc.*.....SA1

SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.7, petitioner wishes to bring to the Court's attention a decision of the Interstate Commerce Commission, *M. Bulifant Trucking, Inc.—Investigation and Revocation of Certificates:* MC-C-30160 (1989), 1990 Fed. Carriers Cases Par. 37,783 at p. 47,071, which was published, and of which petitioner first became aware, after the submission to this Court of his petition for a writ of certiorari. The case is set forth in the Supplemental Appendix annexed hereto.

In *M. Bulifant Trucking, Inc., supra,* the Commission relied, as the basis for sanction powers over non-licensees, upon the decision for which petitioner seeks a writ of certiorari. (SA 12 n. 5, and SA 15, n. 7)[1]

Accordingly, the *M. Bulifant Trucking, Inc.* decision indicates that the issue raised by petitioner is a recurring one, i.e., the Commission is now taking the position that it has sanction authority over non-licensees, even though Congress has specifically revoked such sanction power previously contained in Sec. 42 of the Interstate Commerce Act.

Respectfully submitted,

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1. References to Supplemental Appendix are preceded by "SA".

[¶ 37,783] M. Bulifant Trucking, Inc.—Investigation and Revocation of Certificates; No. MC-C-30160.

By the Commission; December 15, 1989.

.01 Introductory Facts.—In a decision served June 10, 1986, in No. MC-C-10969, *Federal Highway Administration, Department of Transportation v. M. Bulifant Trucking, Inc.* (not printed), this Commission found that M. Bulifant Trucking, Inc. (Bulifant) had persistently and intentionally violated the Federal Motor Carrier Safety Regulations (FMCSR). We noted violations relating to: (1) driver qualifications (49 CFR Part 391); (2) hours of service (49 CFR Part 395); and (3) inspection, repair, and maintenance of vehicles (49 CFR Part 396). Accordingly, we ordered Bulifant to cease and desist, and thereafter refrain and abstain, from violating the FMCSR. We suspended its operating authority for 30 days, effective July 25, 1986, and indicated an intent to revoke its operating rights if its pattern of willful noncompliance continued.

Subsequently, a safety compliance review of Bulifant conducted by the Department of Transportation (DOT) and an investigation by our Office of Compliance and Consumer Assistance (OCCA) uncovered evidence that gave us reason to believe that Bulifant might be violating the cease and desist order and that it might have transported regulated commodities in interstate commerce while its authority was suspended. Accordingly, in a decision served May 1, 1989, we instituted this proceeding to determine whether Bulifant's operating authority should be suspended or revoked

for willful failure to comply with our prior decision. In view of Joseph Bulifant's and Walton J. Bulifant's management of the carrier, we also indicated that we would consider whether the public safety required us to find them unfit to hold additional operating authority. We directed OCCA to participate in the proceeding, and we invited DOT to intervene as a party. OCCA, DOT, and respondents have filed verified statements.

.02 Background.—Joseph Bulifant and his brother Walton P. Bulifant acquired ownership of Bulifant from their father in 1970. At the time, Bulifant held four certificates collectively authorizing the transportation of paper and paper products, scrap metals, lead and zinc products, and several other specified commodities, from, to, and between various points in the Northeast. On January 25, 1971, the Commission issued Bulifant a certificate in No. MC-42156 embracing all of its operating rights and superseding its previously issued certificates. Joseph and Walton P. Bulifant apparently managed Bulifant's operations until 1979, when Walton P. Bulifant became ill. Joseph's son, Walton J. Bulifant, began participating in the carrier's management, and Walton P. Bulifant's involvement gradually lessened.

In January 1981, DOT conducted a safety compliance review of Bulifant, during which it interviewed Joseph Bulifant and Walton J. Bulifant.[1] DOT discovered significant

[1] At that time, Joseph Bullfant was the carrier's vice president and Walton J. Bullfant was the office manager.

violations of safety regulations concerning driver qualifications, drivers' hours of service, and vehicle inspection and maintenance reports. DOT gave the carrier an unsatisfactory safety rating as a result of the compliance review. On June 24, 1982, the Commission issued Bulifant a certificate in No. MC-42156 (Sub-No. 7), authorizing the transportation of general commodities (except classes A and B explosives, household goods, and commodities in bulk), between points in Connecticut, Delaware, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, Rhode Island, Virginia, and the District of Columbia.

In October 1983, DOT conducted another compliance review of Bulifant. DOT again interviewed Joseph Bulifant and Walton J. Bulifant and also interviewed Walton P. Bulifant.[3] In this audit, DOT discovered significant violations concerning driver qualifications, accident reporting, and hours of service. DOT issued a Notice of Claim, and Bulifant paid a $6,000 fine.

DOT again audited Bulifant's operations in December 1984. During this audit, it again interviewed Joseph, Walton J., and Walton P. Bulifant. In this audit, DOT discovered 54 violations of driver qualifications regulations, 1 violation of accident reporting requirements, 1,018 violations of hours of service regulations, and 183 violations of vehicle inspection and maintenance

[3] At this time, Walton J. Bulifant was general manager, Walton P. Bulifant was president, and Joseph remained vice president.

report requirements. The investigation report for this audit stated, "It is quite evident that the subject has not taken seriously the importance of and the danger to the public of noncompliance with the Federal Motor Carrier Safety Regulations." As a result of its findings and its previous experiences with Bulifant, DOT filed a complaint with this Commission on May 16, 1985. The complaint proceeding resulted in the June 10, 1986, cease and desist and suspension order cited above.

In addition to their involvement with this carrier, Joseph Bulifant and Walton P. Bulifant had formed Walton Leasing Co., Inc. (Walton Leasing) sometime before 1986. That company's initial function was to acquire and own tractors and semitrailers and to lease them to Bulifant. When Joseph Bulifant learned of the Commission-ordered suspension of Bulifant's operating authority, he worked out an agreement with a motor carrier named Megonegal's for Trucks, Inc. (Megonegal's). Under the agreement, Megonegal's was to lease equipment from Walton Leasing and serve Bulifant's customers as of July 25, 1986, the effective date of the suspension. Walton P. Bulifant signed the lease agreement on behalf of Walton Leasing. The agreement provided for no compensation to be paid to Walton Leasing. Under the agreement's terms, Walton Leasing would furnish fuel, oil, and maintenance for the leased vehicles and would provide all insurance coverage relating to transportation in the vehicles.

The agreement stated that the leased equipment would be in the exclusive control and possession of Megonegal's. OCCA's investigation disclosed, however, that Bulifant controlled the operations under the lease agreement.

Between July 25 and August 22, 1986, G. B. Goldman Paper Co., of Philadelphia, PA, tendered Bulifant 309 individual shipments of paper for movement to points in the Northeast. The shipments were transported in interstate commerce as 149 truckload shipments, for which Bulifant collected $82,269.58 in gross revenues.[3] Bulifant's tariff rates were used in rating the shipments. The freight bills were prepared on forms normally used by Bulifant. Checks in payment of the freight charges were made payable to Bulifant and were deposited in Bulifant's account.

---

[3] OCCA's exhibit of representative shipments handled during the suspension also shows one shipment moved from New York, NY, to Marlboro, NJ, for Baldwin Paper Co.

At the time of these shipments, Megonegal's only operating authority was contract carrier authority limiting the carrier to transportation under continuing contracts with property brokers. None of the above shipments moved pursuant to such contracts. Effective July 28, 1986, the insurance coverage for Megonegal's on record with the Commission was being provided by the same insurance company, and under the same policy number, as that on record for Bulifant.

At the time of Bulifant's suspension, Walton Leasing also held no authority from this Commission. It was not until April 8, 1988, that Walton Leasing was issued authority.[4]

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[4] Certificate No. MC-166631 (Sub-No. 1-C) and Permit No. MC-166631 (Sub-No. 1-P) provided for transportation of general commodities (except classes A and B explosives, household goods, and commodities in bulk): (1) as a common carrier, between those points in the United States in and east of Minnesota, Iowa, Missouri, Arkansas, and Louisiana; and (2) as a contract carrier, between points in the United States (except Alaska and Hawaii), under continuing contracts with commercial shippers or receivers of such commodities.

On April 21, 1988, DOT conducted another safety review and interviewed Joseph Bulifant, a driver, and a dispatcher. Joseph Bulifant had taken over Bulifant's operations upon the death of Walton P. Bulifant in 1987 and was active in Bulifant's daily operations. Walton J. Bulifant had begun managing the operations of Walton Leasing. In this compliance review, DOT discovered 29 violations of driver qualification regulations and 106 violations of hours of service regulations. As a result of its findings, DOT issued a Notice of Claim against Bulifant for $13,000 on June 2, 1988. It closed its case without collecting a fine, however, based on representations that Bulifant had gone out of business.

On January 10, 1989, the Connecticut Department of Motor Vehicles (DMV) conducted a road inspection of a tractor-trailer unit registered to Bulifant. That inspection revealed a number of safety violations, including brakes that required adjustment and faulty brake lights. The DMV placed the tractor and trailer out of service. On March 22, 1989, the Connecticut DMV again conducted a road inspection of a tractor-trailer combination registered to Bulifant. The DMV found, however, that Bulifant was being operated as Walton Leasing. This DMV inspection also uncovered numerous safety violations, including problems relating to brakes and lights. As a result, the DMV placed the tractor-trailer unit out of service.

On April 17, 1989, DOT audited Walton Leasing. DOT interviewed Joseph Bulifant and a dispatcher/driver. DOT did not interview Walton J. Bulifant, although its inspection report characterized him as active in the day-to-day operations of the carrier. The audit revealed 18 violations of regulations concerning driver qualifications, 210 relating to drivers' hours of service, and 125 concerning vehicle inspection and maintenance reports. In addition, DOT found that Walton Leasing did not have a driver safety training/orientation program or a safety incentive/award program and that management did not review safety compliance status on a periodic basis. DOT found, also, that the carrier could not define a reportable accident or the fatal accident notification requirements and had no policy for taking action against drivers involved in preventable accidents. DOT noted, further, that Walton Leasing had no procedures concerning drivers' use of alcohol and drugs. The review points out that Walton J. Bulifant and Joseph D. Bulifant were both active in day-to-day operations, and determines that, "M. Bulifant allegedly went bankrupt 5/88 and resurfaced as Walton Leasing Co., Inc., with the same principals." DOT issued a Notice of Claim against Walton Leasing for $8,000 on May 2, 1989.

.03 **Discussion and Conclusions.**—In our decision served June 10, 1986, we ordered Bulifant to cease and desist from violating the FMCSR, and we suspended its operating authority for 30 days. We issued that decision pursuant to our enforcement powers under 49 U. S. C. 11701. Pursuant to the

provisions of 49 U. S. C. 10925(c)(1), the Commission may revoke a motor carrier's certificate or permit if the carrier willfully fails to comply with an order issued under section 11701. Willfulness can be found if a person "(1) intentionally does an act which is prohibited—irrespective of evil motive or reliance on erroneous advice, or (2) acts with careless disregard of statutory requirements." *Lawrence v. Commodity Futures Trading Com'n*, 759 F.2d 767, 773 (9th Cir. 1985).

Because of the substantial threat of continued unsafe operations and the important public policy considerations involved in ensuring safe motor carrier operations, we will revoke the carriers' authorities and issue a cease and desist order against the involved individuals.

There is no question that Bulifant willfully violated the Commission's suspension order. Whereas Bulifant's principals attempted to make it appear that a friendly motor carrier, Megonegal's, was serving Bulifant's customers during the suspension, it is clear that Megonegal's played little or no role in the service actually provided. The agreement was merely an attempt to cover up the fact that Bulifant equipment was used and Bulifant was paid directly for the transportation. The lease was a sham. Joseph Bulifant, being highly experienced in regulated interstate transportation, certainly should have known that the scheme involving Megonegal's, Walton Leasing, and Bulifant violated the suspension order. Joseph Bulifant's fears that Bulifant would lose customers and go out of business as a result of the order hardly excuse the evasive

actions. Joseph Bulifant had many years' experience in the transportation industry. It is difficult to accept as mitigation his statements that he was not familiar with Megonegal's authority, what service it actually performed, or why Bulifant did the billing, or that Bulifant had no intent to violate the law. Even if unintentional, the Bulifant-Megonegal's relationship was carried out with indifference to legal requirements. See *Lawrence, supra*; and *Schreiber—Invest. of Opers. & Revoc. of Certifs.*, 125 M. C. C. 532, 564 (1976), and cases cited therein. In the circumstances, revocation of Bulifant's operating authority is warranted.

A second, separate ground for revocation exists. As noted, we ordered Bulifant to cease and desist from violating the FMCSR. As OCCA points out, DOT compliance reviews in 1981, 1983, and 1984 had disclosed persistent violations by Bulifant of regulations relating to drivers' qualifications, drivers' hours of service, and vehicle inspection and maintenance reports. In reporting on its 1984 compliance review, DOT stated that Bulifant had "not taken seriously the importance of and the danger to the public of noncompliance" with the FMCSR. The April 1988 compliance review of Bulifant (resulting in a $13,000 Notice of Claim), and the April 1989 compliance review of Walton Leasing, reveal continued noncompliance in the same basic areas.

Respondents attempt to minimize the severity of the violations by characterizing them as mere violations of recordkeeping requirements. This argument ignores the system by which DOT ensures safety compliance. DOT does not routinely ex-

amine trucks and drivers; the carrier is responsible for making those examinations and keeping records of them. DOT then *checks the records* to ensure that the trucks and drivers are safe and qualified for operation. See *DOT v. ICC*, 733 F. 2d 105, 111 (D. C. Cir. 1984). Moreover, this argument ignores the equipment-related defects and the Connecticut DMV actions.

Respondents' suggestion that DOT and the Commission are nitpicking is not well taken. In review after review of Bulifant, and now its successor Walton Leasing, DOT has discovered serious violations warranting severe enforcement actions. "[P]ersistence in violations over a period of time, despite admonitions and enforcement penalties, justifies characterizing the conduct under consideration as willful." *Schreiber, supra,* at page 564, and cases cited therein. On this record, we are unwilling to accept at face value Joseph Bulifant's claim that he now intends to comply with the law.

Merely revoking Bulifant's authority would be ineffective since its operations are now being conducted by Walton Leasing. Under the circumstances, the record before us also supports revocation of Walton Leasing's operating authority. "[T]he law is well settled that the 'corporate entity may be disregarded when the failure to do so would enable the corporate device to be used to circumvent a statute.'" *Brudn's*

Freezer Meats v. United States Dept. of Agr., 438 F. 2d 1332, 1343 (8th Cir. 1971). See also *Sebastopol Meat Company v. Secretary of Agriculture*, 440 F. 2d 983, 985 (9th Cir. 1971), ("there are many cases that stand for the general principle that the mere form of a business organization is insufficient to shield the practices sought to be prohibited from the reach of a federal regulatory agency.") See also *Electric Bond & Share Co. v. SEC*, 303 U. S. 419, 440 (1938); and *FTC v. Standard Education Society*, 302 U. S. 112, 119 (1937). Compare also *Mattes v. United States*, 721 F. 2d 1125 (7th Cir. 1983), in which, at page 1131, the court approved agency action "to prevent manipulation of corporate structures to circumvent suspension orders." In enacting provisions permitting the Commission to revoke operating authority, Congress could not have intended to deprive the Commission of the power to make its revocation decisions effective. In light of the clear evidence that Bulifant is now Walton Leasing, the latter's authority must also be revoked. This result was clearly contemplated by our order initiating this proceeding, where we specifically noted that Walton was under common control with Bulifant and had participated in operations during the period of suspension.[8]

[8] Our authority to exercise ancillary powers in order to give effect to our orders was recently reconfirmed in *Zola v. Interstate Commerce Commission*, No. 89-3499 (U. S. C. A., 3d Cir., November 16, 1989). There the court specifically approved the revocation of a carrier's authority where the carrier had been found to be the successor of a carrier whose authority had been previously revoked and both were controlled by the same individual. A prior order against the second carrier was not necessary. *Id.*, slip op. at 21-22.

Joseph Bulifant contends that the transfer of motor carrier operations from Bulifant to Walton Leasing was occasioned by legitimate business concerns. OCCA argues that Bulifant's principals were merely attempting to free themselves of the cloud that had long covered Bulifant's operations. In any event, as to the safety issues of primary concern to us, we see little to distinguish the Walton Leasing enterprise from the Bulifant enterprise that preceded it. Walton J. Bulifant had been managing Bulifant's operations until Joseph Bulifant took over approximately 1 year before the April 1988 compliance review of Bulifant that resulted in the issuance of a Notice of Claim. Thereafter, Walton J. Bulifant managed Walton Leasing's operations until Joseph Bulifant took over shortly after the April 1989 compliance review of Walton Leasing that also resulted in the issuance of a Notice of Claim.* Joseph Bulifant was at least nominally responsible for Bulifant's day-to-day operations in the 1980's, and he would be responsible for those of Walton Leasing in the future. Significantly, Walton Leasing appears to be using the same motor vehicle equipment and a number of the same drivers that Bulifant had been using.

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* Notwithstanding Joseph Bulifant's claim that the poor showing in the April 1989 audit was caused by a loss of Walton Leasing's records due to a fire, compliance reviews had disclosed that neither Bulifant nor Walton Leasing was: (1) routinely inspecting and maintaining motor vehicles; (2) ensuring that drivers met applicable qualification standards; or (3) ensuring that drivers observed hours of service regulations.

Respondents have made no showing that Walton Leasing's operations are or will be any different from those of Bulifant. We would have expected, at the very least, a definitive program for assuring future compliance. What we find is little more than a plan to continue the Bulifant operation in a different corporate form. In the circumstances, to make the revocation of Bulifant's authority effective, we must also revoke the operating authority of Walton Leasing.

Finally, in view of the responsibility of Joseph Bulifant and Walton J. Bulifant for the management of Bulifant and Walton Leasing, OCCA asks that the Commission enter a cease and desist order against them to prevent their future participation in for-hire transportation activities within the Commission's jurisdiction. Although the statute does not specifically authorize the entry of a cease and desist order against noncarrier individuals, the Commission is not limited to specific statutory authorizations in formulating responses to evils and abuses in the transportation industry. The statute expressly provides that "[e]numeration of a power of the Commission in this subtitle does not exclude another power the Commission may have in carrying out this subtitle." 49 U. S. C. 10321(a). See, *e. g., ICC v.*

American Trucking Associations, 467 U. S. 354, 365 (1984) (Commission's authority extended beyond the specific provisions of the statute to those actions that further statutory mandate); and *Trans Alaska Pipeline Cases*, 436 U. S. 631, 655 (1978) (Commission has powers "adjunct" to enumerated powers). See also *United States v. Chesapeake & Ohio R. Co.*, 426 U. S. 500, 513-514 (1976), in which the court held that, acting under its implied powers, the Commission can formulate orders that are tailored to the particular circumstances. Implied powers may properly be invoked not merely to punish transgressors but also to protect the integrity of the agency's processes. See *Amoskeag Co. v. ICC*, 590 F. 2d 388, 392-393 (5th Cir. 1979); and see also *Greater Boston Television Corporation v. FCC*, 463 F. 2d 268, 291 (D. C. Cir), *cert. denied*, 406 U. S. 950 (1972).

Here, issuing a cease and desist order against Joseph Bulifant and Walton J. Bulifant is adjunct to our enumerated powers and is necessary to further a specific statutory mandate—the revocation of authority.[1]

---

[1] The Commission's power to bar individuals from engaging in specific transportation activities was recently affirmed in *Zola, supra*, slip op. at 24-26.

Both Joseph Bulifant and his son Walton J. Bulifant were active in managing Bulifant and Walton Leasing and were responsible for the persistent violations of the FMCSR. It is well-settled that a command to a corporation is, in effect, a command to those who are officially responsible for the conduct of its affairs. "If they . . . prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience . . . " *Wilson v. United States,* 221 U. S. 361, 377 (1911). Were we not to bar Joseph Bulifant and his son from participation in the regulated transportation industry, they could form a new corporation as they did with Walton Leasing, or purchase the stock of an existing carrier, and resume operations. The integrity of our orders would be compromised, and, perhaps more importantly, based on these individuals' past actions, the public safety could be threatened. The entry of cease and desist orders directed against the individuals responsible for the management, direction, and control of the activities of a corporation is proper when it appears that an order limited in its application only to the corporation would prove futile. *Sebastopol, supra,* at page 985.

Joseph Bulifant states that he has fired his son and that he will comply with regulation in the future. Here, however, persistent, inexcusable past unlawful conduct, coupled with the lack of a definitive program for ensuring future compliance, undercuts a belief that future compliance can realistically be anticipated.

The landmark decision in *Gilbertville Trucking Co. v. United States*, 371 U. S. 115, 130 (1962), recognized the authority of agencies to impose drastic remedies to expunge violations, subject only to the limitation that action be taken "with as little injury as possible to the interests of private parties or the general public." The Supreme Court recognized the importance of allowing the agency to choose the remedy and "to tailor the remedy to the particular facts of each case so as to best effectuate the remedial objectives . . . ." *Id.* See also *Querner Truck Lines, Inc.—Investigation*, 100 M. C. C. 215, 220 (1965). When faced with a carrier or carriers that consistently have demonstrated an inability or unwillingness to comply with the law, and when we have no real basis for assuming future compliance, drastic action is warranted. See *Machinery Haulers Association*, 5 I. C. C. 2d 808, 812 (1989). This is particularly so where, as here, the public safety is implicated.[8]

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[8] We believe that the Bulifants should be barred from engaging in any regulated transportation, not just the specific business in which they were previously engaged, since safety violations can occur in any phase of transportation. Compare *Zola, supra*, slip op. at 26-27.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The authority held by M. Bulifant Trucking, Inc., in Certificates No. MC-42156, issued January 25, 1971, and No. MC-42156 (Sub-No. 7), issued June 24, 1982, and by Walton Leasing Co., Inc., in Certificate No. MC-166631 (Sub-No. 1-C) and Permit No. MC-166631 (Sub-No. 1-P), both issued April 8, 1988, is revoked, effective January 22, 1990.

2. Joseph D. Bulifant and Walton J. Bulifant shall, on or before January 22, 1990 cease and desist, and thereafter refrain and abstain from, directly or indirectly engaging in any transportation activities within the Commission's jurisdiction until further order of the Commission.

3. Joseph D. Bulifant and Walton J. Bulifant must comply with the provisions of 49 CFR 1119.1 by informing the Commission by affidavit of their compliance with this decision by January 22, 1990.

4. This proceeding is discontinued.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Lamboley, Phillips, and Emmett.

Supreme Court, U.S.
FILED
MAY 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1494

In the Supreme Court of the United States

OCTOBER TERM, 1989

RALPH J. ZOLA, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Interstate Commerce Commission acted within its authority when it ordered petitioner personally to cease and desist from further operations which had previously been denied only to corporations which he owned and controlled.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1494

RALPH J. ZOLA, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 889 F.2d 508. The decision of the Interstate Commerce Commission (Pet. App. 29a-58a) is reported at 5 I.C.C.2d 655.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1989. A petition for rehearing was denied on December 18, 1989. Pet. App. 28a. The petition for a writ of certiorari was filed on March 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. For almost 20 years the Interstate Commerce Commission (ICC) has been investigating and attempting to stop the unlawful practices of companies owned and controlled by petitioner, Ralph J. Zola. In this case, the ICC ordered petitioner himself, not just the corporation he was currently using, barred from operating or holding out to provide service subject to ICC jurisdiction. /97/

The saga began in ~~1987~~ when the ICC instituted its first formal investigation into the practices of AAACon Auto Transport, Inc. (AAACon), to determine whether its unlawful practices warranted suspension or revocation of its authority to operate as a motor carrier in interstate commerce. *AAACon Auto Transport, Inc.—Investigation and Revocation of Certificate*, I.C.C. No. MC-C-7287 (*AAACon I*).

Extensive hearings were held before an administrative law judge (ALJ), who found that AAACon was not a fit carrier. *AAACon I* (not printed) (served Nov. 30, 1973) (*reprinted* at Gov't C.A. Addendum B). The ALJ listed ten specific practices from which AAACon should be required to cease and desist, and warned that noncompliance would result in revocation or suspension of part or all of AAACon's operating authority. *AAACon I*, at 14-15.[1]

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[1] Among other violations, the ALJ found that AAACon had deliberately pursued a course of arbitrarily denying just damage claims filed with it; had engaged in "blatant obstructionist tactics" to avoid settling claims; had used a "bill of lading agreement" for its shippers which differed significantly (to the shippers' detriment) from the one incorporated in its tariffs filed with the ICC; had held out to the public a type of service that it did not actually perform; had performed operations that were not authorized by its ICC certificate; and had violated various other provisions of the Act. *AAACon I*, at 9-10, 13.

The ALJ detailed petitioner's involvement as a principal shareholder, vice-president, treasurer, and director of the company; as its agent in the area of claims settlement, where many of the company's abusive practices were concentrated; and as founder of a law firm that maintained offices in common with AAACon and handled all claims for the company. *AAACon I*, at 4, 6, 10.

Both the Commission and the reviewing court affirmed the ALJ's cease and desist order. *AAACon Auto Transport—Investigation and Revocation of Certificate*, 124 M.C.C. 493 (1976), aff'd *sub nom. AAACon Auto Transport, Inc.* v. *ICC*, 553 F.2d 93 (2d Cir. 1977) (Table). Thereafter, as required by the order, petitioner filed an affidavit with the ICC certifying AAACon's compliance with the cease and desist order. Gov't C.A. Addendum K, App. E.

2. After continuing to receive numerous complaints from the public about AAACon's service, the ICC reopened the investigation proceeding to determine whether AAACon had violated the cease and desist order and, if so, whether its operating authority should be suspended or revoked. *AAACon Auto Transport, Inc.—Investigation and Revocation of Certificate*, I.C.C. No. MC-C-7287 (*AAACon II*). Extensive hearings lasting 63 days were conducted by a different ALJ. In his decision, he found that AAACon had repeatedly violated each of the ten paragraphs of the cease and desist order; that the violations were willful; and that AAACon's operating authority should be revoked. *AAACon II* at 2, 4-30, 44-45 (not printed) (served Feb. 28, 1983) (*reprinted at* Gov't C.A. Addendum K).

The ALJ determined that AAACon had demonstrated an attitude of "the public be damned"

(*AAACon II*, at 33, 35), and had "thumbed its nose" at the ICC's cease and desist order (*AAACon II*, at 43). In particular, the ALJ identified "the sustaining force behind [AAACon] as that of its president" —the petitioner—noting that "it is his views which dominate and permeate the entire company from the very top to its lowest levels" and his "view which prevails even when such view is not in accord with those of [the other members of the company's Review Committee]." *AAACon II*, at 36.

The Commission, judging the ALJ's findings to be "substantially correct in all material respects," affirmed and revoked all of AAACon's operating authority. *AAACon Auto Transport, Inc.—Investigation and Revocation of Certificate*, I.C.C. No. MC-C-7287, at 10, 23 (not printed) (served Aug. 7, 1984) (*reprinted at* Gov't C.A. Addendum F), aff'd *sub nom. AAACon Auto Transport, Inc.* v. *ICC*, 792 F.2d 1156 (D.C. Cir. 1986), cert. denied, 481 U.S. 1048 (1987). The ICC concluded that "[t]he record reveals violations from border to border and coast to coast, in a wide variety of aspects of [AAACon's] operations" and that "AAACon's disregard and apparent contempt for the public are pervasive." Gov't C.A. Addendum F at 15. The court of appeals agreed, characterizing the evidence of violations of the cease and desist order as "overwhelming." 792 F.2d at 1160.

3. Shortly after the ALJ decided that AAACon's authority should be revoked, members of the Zola family attempted to obtain new authority that could be used to perpetuate the AAACon operations under a different name. Pet. App. 6a. In June 1983, petitioner's father, Irving Zola, applied for a license for

a nonexistent company, using the name AA Babcock Transport, Inc. The ICC originally granted the application, but cancelled the authority when it discovered the fraud involved. *AA Babcock Transport, Inc.—Common Carrier Application*, I.C.C. No. MC-168499 (not printed) (served Jan. 31, 1986), aff'd *sub nom. AA Babcock Transport, Inc.* v. *ICC*, 821 F.2d 821 (D.C. Cir. 1987) (Table) (*reprinted at* Gov't C.A. Addenda G, H). Petitioner's sister, Marion J. Zola, submitted another application, but withdrew it when the ICC scheduled a hearing in the case to determine whether it was part of a scheme to continue the AAACon operations. *AA Aaron, Inc., Broker*, I.C.C. No. MC-171177 (not printed) (served Dec. 21, 1983) (*reprinted at* Gov't C.A. Addendum J); Pet. App. 7a.

4. Petitioner then engaged in what the court of appeals referred to as a "shell game" (Pet. App. 8a) to continue AAACon operations under different corporate names. On the day the AAACon revocation order became effective (October 8, 1984), petitioner purchased the controlling stock of North American Transport Co., Inc. (Natco), a defunct corporation whose only asset was its ICC license. The purchase price of $12,000 was paid by petitioner's personal check. Petitioner also established the Auto Caravan Corporation as a division of Natco with petitioner as its sole shareholder, officer, and director. Pet. App. 8a, 11a.

As detailed by the court of appeals (Pet. App. 8a-13a), petitioner explained to AAACon agents that the intent of the new agency agreements would "be to put you in the same position you were under AAACon's operation, with zero changes." Pet. App. 8a. As petitioner emphasized, "you are going to end

up on October 8th where you are on October 7th" because on that day "Auto Caravan shall, like Phoenix, arise from the ashes, and there is no way to stop it." Pet. App. 8a-9a. Tariffs, charges, contract terms, and telephone numbers were to remain the same as they had been when AAACon was in operation. Pet. App. 8a.[2]

As planned, the renamed AAACon operation continued uninterrupted after October 7, 1984, under petitioner's control. AAACon had operated through a network of company and agency offices situated in major cites throughout the continental United States. Natco/Auto Caravan conducted operations in the same way, using most of the same locations, addresses, telephone numbers, and managers or agents. Pet. C.A. App. 18-27, 99; see, *e.g.*, *id.* at 87-88.

When the ICC learned of petitioner's apparent evasion of the AAACon revocation order, it instituted a new proceeding to consider whether to revoke the new carrier's operating authority and whether to direct petitioner permanently to cease and desist from engaging, directly or indirectly, in any for-hire transportation activities within its jurisdiction. *Ralph J.*

---

[2] Petitioner carefully instructed employees about how to respond to inquiries from the public. He suggested that customers be told: "We used to be with AAACon, not we used to be AAACon, but we used to be with AAACon. We found a name that is easier to spell. We bought greater authority." Pet. App. 10a. He added that "[t]he only thing I don't want you to do is tell them this is the same corporate entity." Pet. App. 11a. Customers were to be advised that Auto Caravan had the same insurance and contract terms as had AAACon. Persistent questioners were to be referred to petitioner or his colleague. Petitioner warned that it should never be said merely that AAACon had changed its name. Pet. App. 11a-12a.

Zola, North American Transport Co., Inc., and Auto Caravan Corp.—Show Cause Proceeding, I.C.C. No. MC-C-30003 (served Sept. 12, 1986); Pet. C.A. App. 9-12. After conducting extensive hearings, a third ALJ found that the record contained "convincing proof" of the nexus between AAACon and its successors, Natco/Auto Caravan, and of the unlawful continuation of AAACon's operations by those entities. *Ralph J. Zola, North American Transport Co., Inc., and Auto Caravan Corp.—Show Cause Proceeding*, I.C.C. No. MC-C-30003 (not printed) (served Dec. 15, 1987); Pet. C.A. App. 17. He also found that the record clearly demonstrated that petitioner was "the sole moving force" in willfully and unlawfully continuing AAACon's activities, operations, and business through Natco/Auto Caravan. *Id.* at 17, 30. He concluded that the only effective remedy was to revoke Natco's operating authority and direct petitioner personally to cease and desist from engaging, directly or indirectly, in any transportation activities within the ICC's jurisdiction. *Id.* at 27, 30, 31. The ICC, explicating the circumstances in similar terms, affirmed the ALJ's decision. *Ralph J. Zola—Show Cause Order*, 5 I.C.C.2d 655 (1989); Pet. App. 29a-58a.

5. The court of appeals affirmed both the revocation of Natco's operating authority and the cease and desist order issued against petitioner. Pet. App. 1a-27a. With regard to the latter, the court reviewed the long history of the ICC's efforts to bring petitioner's operations into compliance (Pet. App. 2a-16a) and petitioner's "extreme and—until now—successful attempts to flout the Commission's orders and evade its jurisdiction." Pet. App. 26a. The court concluded that the "exceptional circumstances" of the

case warranted the extreme measure of a debarment order. Pet. App. 23a, 26a.

The court found sufficient statutory authority for the agency to take such action in three sections of the Interstate Commerce Act: 49 U.S.C. 10925 (1982 & Supp. V 1987), which permits the agency to revoke operating authority; 49 U.S.C. 10321, which authorizes it to inquire into the business of those who control motor carriers; and 49 U.S.C. 11701 (1982 & Supp. V 1987), which authorizes the ICC to take appropriate action to compel compliance with the law. Pet. App. 25a. The court noted that this Court has confirmed that the ICC has broad authority to exercise remedial powers not expressly enumerated in the Interstate Commerce Act when necessary to achieve statutory goals. Pet. App. 18a-19a (citing *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354 (1984)).

The court of appeals partially remanded the case, directing the Commission to tailor the debarment order to exclude activities wholly unrelated to the transportation activities involved in the AAACon and Natco proceedings. Pet. App. 26a-27a.[3]

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[3] When the ICC issued its order on remand (*Ralph J. Zola, North American Transport Co., Inc., and Auto Caravan Corp. —Show Cause Proceeding* No. MC-C-30003 (not printed) (served Dec. 28, 1989), petitioner filed another petition for review. *Ralph J. Zola* v. *ICC*, No. 90-3018 (3d Cir. filed Jan. 16, 1990).

ARGUMENT

The court of appeals properly ruled that the ICC has the authority to take those steps necessary in the peculiar and extreme facts of this case to end finally the effective operation of the AAACon business. Its decision does not conflict with any decision of this Court or any court of appeals. Further review is therefore not warranted.

1. The ICC has broad discretion to choose appropriate remedies "when necessary to achieve specific statutory goals." *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354, 365 (1984). As in the case of those agencies entrusted with similar powers, the courts should intervene to overrule the Commission's selection of a remedy only where the remedy chosen "is unwarranted in law or is without justification in fact." *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 112-113 (1946).

a. In this case, the Commission acted under 49 U.S.C. 10925(b) (1982 & Supp. V 1987) to terminate a long history of consumer abuse and statutory and regulatory violations by petitioner as the controlling force behind various corporations. Section 10925(b) provides that the agency may "[o]n complaint or on its own initiative and after notice and an opportunity for a proceeding, * * * suspend, amend, or revoke any part of a certificate, permit, or license" held by a motor carrier found willfully to have violated legal requirements, agency orders, or the conditions of its operating authority. Petitioner does not challenge the ample record that documents his attempt improperly to continue AAACon operations in the corporate form of Natco/Auto Caravan.[4]

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[4] We note that petitioner's only challenge is to that portion of the court of appeals' decision which upheld the ICC's au-

Petitioner's contention is, instead, that the Commission could not reach him as the "sole moving force" of the enterprise because he was a "non-licensee." Pet. 6-10. That contention ignores the court of appeals' conclusion that petitioner was, in fact, the "alter ego" of Natco/Auto Caravan, which was in turn simply a continuation of AAACon.[5] Pet. App. 24a; see also *Zola—Show Cause Proceeding*, 5 I.C.C.2d at 672; Pet. App. 54a. As the court of appeals noted (Pet. App. 24a), the ICC's action is consistent with the principle that an agency may take action against the individuals controlling a regulated corporation. See, *e.g.*, *FTC* v. *Standard Education Society*, 302 U.S. 112 (1937) (proper to include individual officers in "cease and desist" order where there is reason to believe that they will individually continue to attempt to evade the agency's order); *Sebastopol Meat Co.* v. *Secretary of Agriculture*, 440 F.2d 983, 984-985 (9th Cir. 1971) (declining to reach issue whether cease and desist order could be issued against individual not expressly listed in section, where owner properly included in order as alter ego of company); *Guziak* v. *FTC*, 361 F.2d 700, 704 (8th Cir. 1966), cert. denied, 385 U.S. 1007 (1967) (corporate principals properly included in cease and desist order); see also *ICC* v. *Rio Grande Growers Cooperative*, 564 F.2d 848 (9th Cir. 1977). It is well settled that those who are officially responsible

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thority to act as it did. Petitioner does not challenge the affirmance of the agency's findings of fact. See Pet. i; Pet. App. 21a-22a.

[5] Petitioner's discussion of those entities that the Commission can "sanction" in addition to carriers thus misses the point. Pet. 7. Petitioner was acting *as* the carrier against which the agency needed to take action.

for the conduct of a corporation's affairs and who "prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty [are] no less than the corporation itself * * * guilty of disobedience." *Wilson* v. *United States*, 221 U.S. 361, 376 (1911).

b. The breadth of the Commission's authority is confirmed by 49 U.S.C. 11701 (1982 & Supp. V 1987). That Section provides that "[i]f the Commission finds that a carrier or broker is violating this subtitle, the Commission shall take appropriate action to compel compliance." In this case, the Commission determined after extensive hearings that the debarment order was necessary and appropriate "in direct furtherance of our affirmative duty to terminate illicit operations * * * and to protect the integrity of our regulatory processes." *Zola—Show Cause Proceeding*, 5 I.C.C.2d at 670, 673.[6]

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[6] Petitioner contends (Pet. 12-13) that he is being subjected to the Commission's remedial authority without having been a party to any proceeding in which he was charged with wrongdoing. As the Commission put it, "[t]his argument overlooks the obvious." *Zola—Show Cause Proceeding*, 5 I.C.C.2d at 671; Pet. App. 53a. The agency instituted *this* proceeding, which itself included extensive hearings and generated detailed findings of petitioner's improper actions, in order to investigate petitioner's activities. See *Zola—Show Cause Proceeding* (order instituting proceeding), Pet. C.A. App. 9-12; *Zola—Show Cause Proceeding* (initial decision), Pet. C.A. App. 17-27.

Similarly, petitioner objects (Pet. 4-6) that the revocation order issued in the first (AAACon) proceeding is improperly being used as an injunction against him. This argument also mistakes the matter: the Commission issued the cease-and-desist order against petitioner only after determining, in the present proceeding, that he had violated the Act by maintaining AAACon operations (clearly prohibited by the revoca-

Nor can there be any contention that the Commission did not have the authority to investigate petitioner's role in the operation of Natco. 49 U.S.C. 10321(b) provides that the Commission may:

> (1) inquire into and report on the management of the business of carriers providing * * * transportation * * * subject to this subtitle;
>
> (2) inquire into and report on the management of the business of a person controlling, controlled by, or under common control with those carriers * * *.[7]

2. Even if the foregoing provisions do not expressly confer authority on the ICC to enter a debarment order when necessary to effectuate a decision to revoke an operating license, the Commission has implied authority to enter such an order. Contrary to

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tion order) under the corporate auspices of Natco/Auto Caravan. Nor can petitioner successfully contend (see Pet. 5-6) that he lacked notice: the order initiating the proceeding stated that its purpose was to "show cause why * * * [petitioner should not be directed] permanently to cease and desist from engaging * * * in any for-hire transportation activities within th[e] Commission's jurisdiction." *Zola—Show Cause Proceeding*, Pet. C.A. App. 9.

[7] The ICC's power in such situations is not affected by the altogether independent proposition, supported by such cases as *Civil Aeronautics Bd.* v. *Delta Airlines, Inc.*, 367 U.S. 316 (1961), and *SEC* v. *Sloan*, 436 U.S. 103 (1978) (cited at Pet. 8), that agencies may not exceed specific limitations in their enabling statutes. Contrary to petitioner's assertion (*ibid.*), those cases did not involve statutory provisions mandating an exclusive, judicial enforcement mechanism. In any case, there is no such exclusivity indicated here. Rather, the statute provides that the Commission "may" bring a civil action or refer a case to the Attorney General; it does not require the agency to pretermit administrative remedies in order to do so. 49 U.S.C. 11702, 11703 (1982 & Supp. V 1987).

petitioner's suggestion (Pet. 9-10) that the ICC can exercise no powers not explicitly listed in the statute, 49 U.S.C. 10321(a) establishes that:

> The Interstate Commerce Commission shall carry out this subtitle. Enumeration of a power of the Commission * * * does not exclude another power the Commission may have in carrying out this subtitle.

This Court has confirmed that the ICC possesses broad powers to carry out the objectives of the statute it is charged with administering. See, *e.g.*, *ICC* v. *American Trucking Ass'ns*, 467 U.S. at 365 (ICC's authority extends beyond the specific provisions of the statute to those actions which further a statutory mandate); *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 654-655 (1978) (ICC has powers "adjunct" to enumerated powers); *American Trucking Ass'ns* v. *United States*, 344 U.S. 298, 311-312 (1953) (upholding ICC leasing rules, even though leasing was not referred to in the Act, as part of its authority to "administer, execute, and enforce all provisions of this part"). These powers are necessarily implied because the drafters of the statute could not "include specific consideration of every evil sought to be corrected." *American Trucking Assn's*, 344 U.S. at 309-310. As this Court has recognized, the absence of express authority should not force the ICC "to sit idly by and wink at practices that lead to violations of [the Act's] provisions." *Id.* at 311.[8]

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[8] Petitioner's contention (Pet. 7-8) that the Commission cannot exercise implied powers over him because Congress explicitly revoked any power it had over non-licensees when it repealed 49 U.S.C. 42 (1976) is without merit. This provision was repealed in 1978 as part of a general recodification of the Interstate Commerce Act that was designed to "restate,

3. Contrary to petitioner's contention (see Pet. 11-12), there is no conflict between the circuits concerning the ICC's authority to use administrative action in order to carry out its statutory mandates and to preserve the integrity of its own procedures.

As the court of appeals explained (Pet. App. 25a), *Wallach* v. *SEC*, 202 F.2d 462 (D.C. Cir. 1953), stands only for the limited proposition that the SEC may not discipline nonregistered salesmen of a registered broker-dealer under the authority of the provision defining the SEC's authority over brokers and dealers. And *Touche Ross & Co.* v. *SEC*, 609 F.2d 570 (2d Cir. 1979), far from aiding petitioner, confirms that *Wallach* did not reach the issue whether the SEC (let alone any other agency) can take action necessary to guard its own procedures or meet statutory duties under sections providing more general authority. *Touche Ross & Co.*, 609 F.2d at 680 n.16.[9]

4. Finally, the action taken by the Commission here is a rare occurrence. Should the issue arise

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without substantive change," the laws previously in force. Act of Oct. 17, 1978, Pub. L. No. 95-473, § 3(a), 92 Stat. 1466. As part of this process, Congress omitted Section 42, which pertained to the joinder of parties in both ICC and judicial proceedings, on the ground that it was "[s]uperseded" since "[j]oinder of parties is now covered by the Federal Rules of Civil Procedure[]." H.R. Rep. No. 1395, 95th Cong., 2d Sess. 247 (1978). Thus, no inference can be drawn from the repeal of this section that Congress intended to curtail the Commission's powers to enforce its own orders.

[9] Petitioner claims that the ICC is not empowered to impose a "sanction" on him. Pet. 10-11. However, the order prohibiting petitioner from engaging in regulated transportation was issued as a remedial, not punitive, measure. Indeed, the agency left open the possibility that, at any time in the future, petitioner could apply for reinstatement. 5 I.C.C.2d at 674 n.15; Pet. App. 57a n.15.

more frequently, there is time enough for this Court to consider the issue presented after it has been more thoroughly deliberated in the courts of appeals.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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No. 88-6186

In the
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October Term, 1988

RALPH J. ZOLA,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION and UNITED STATES

Respondents.

ON PETITION FOR WRIT OF CERTIORARI

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I

CLARIFICATION OF FACTS

Both parties agree that the facts of this case are not in dispute. However, the partial, and inflammatory, reportage of those facts contained in the reply of the Commission together with omission of key facts creates inaccuracies.

There were two AAACon proceedings, as required by the Interstate Commerce Act, 49 U.S. Code Sec. 10925. The first led to a cease and desist order in 1976 against certain anti-consumer conduct of AAACon in its automobile transport business. The second in 1984 led to a revocation to AAACon's carrier license.

In neither of the two AAACon proceedings was petitioner Zola made a party. Indeed, in the second AAACon proceeding, the Administrative Law Judge noted that inasmuch as he was not a party the orders in those proceedings did not "run against" him (4a, n.1).[1]

After the completion of both AAACon proceedings, Mr. Zola purchased the stock of another carrier, Natco, and continued in the auto transport business. That purchase was, as the Commission has acknowledged repeatedly, beyond its jurisdiction to approve or prohibit (47a, n.8). Two years later, in 1986, the Commission brought a proceeding against Natco and, for the first time, against Mr. Zola.

Significantly, in the Natco proceeding neither Mr. Zola nor Natco were charged with continuing the anti-consumer abuses of AAACon (34a, n.2; and 50a). Rather, they were charged simply with continuing the type of business AAACon had conducted—the automobile transport business. As the Third Circuit observed in the Zola/Natco proceeding, no evidence was permitted to be adduced, nor was there any charge that petitioner Zola or that Natco had continued the anti-consumer wrongful practices of AAACon (34a, n.2).

Equally as significant, in the Zola/Natco proceeding, com-

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[1] References are to decision of the Third Circuit here on review and to the Commission's decision which the Third Circuit affirmed, both of which are reproduced at the end of petitioner's initial petition to this Court.

menced in 1986, there was no evidence adduced that Mr. Zola had been the alter ego of AAACon. The sole evidence of his alleged alter ego status was adduced in the AAACon proceeding to which Mr. Zola was not a party.

II

THE COMMISSION HAS NO JURISDICTION TO SANCTION NON-LICENSEES

a) The Commission Has No Explicit Sanction Authority Over Non-licensees.

Until the decision of the Third Circuit below, the law was clear—no administrative agency has sanction powers over non-licensees unless: a) the agency had been granted by Congress authority to sanction "all persons"; and b) Congress had given the agency no alternatives such as court action to seek enforcement.

Prior to the decision below, the case law held that there were two classes of agencies: a) those, such as the Federal Trade Commission and the Department of Agriculture, which had been given jurisdiction by Congress over "all persons"; and b) those which had only limited jurisdiction over entities specified by statute such as licensees. Agencies in the latter category were required to go to court to obtain sanction orders against persons other than licensees (non-licensed individuals). The Interstate Commerce Commission belonged to this latter group of agencies, and Congress had provided the Interstate Commerce Commission with access to courts to obtain injunctions and sanctions against non-licensees in 49 U.S. Code Sec. 11702, 11703, 11901, 11906. Congress also gave the agency explicit authority over certain enumerated classes of non-licensees, cf. 49 U.S. Code Sec. 11701 and 10934 more fully discussed below.

b) Implied Sanction Authority Is A Radical Departure From Prior Law

This Court has often declared that sanction authority over non-licensees will not be implied. *Arrow-Hart & H. Elec. Co. v. F.T.C.,* 291 U.S. 587 (1934); *S.E.C. v. Sloan,* 436 U.S. 103 (1978). This is all the more true where the agency has adequate alternatives such as access to court enforcement. *C.A.B. v. Delta Airlines,* 367 U.S. 316 (1961). This rule has been heretofore followed by all circuits considering the issue.

Wallach v. S.E.C., 202 F.2d 462 (D.C. Cir. 1953); *Touche Ross & Co. v. S.E.C.*, 609 F.2d 570 (2d Cir. 1979).

As this Court has repeatedly noted, administrative agencies cannot claim, as the Commission has in the case here on review, implied sanction powers in addition to those explicitly granted by Congress "on the theory that this is necessary to render effective the prescribed statutory remedy." *Arrow-Hart v. H. Electric Co., supra,* at 598. Accordingly, the basis for the Third Circuit's decision here on review that the implied sanction authority of the Commission over the non-licensee was necessary to render the Commission's sanction of AAACon effective (24a) is in error.

The Third Circuit gave four rationales to support its expansion of implied agency authority. First, it relied on cases concerning those agencies which had been given explicit authority by Congress over "all persons," such as the Federal Trade Commission and Department of Agriculture.[2] These cases are clearly not in point because Congress never granted the Interstate Commerce Commission jurisdiction over "all persons."

Second, the Third Circuit relied on sanction cases arising under statutes, such as the Interstate Commerce Act where the sanction was applied directly to licensees, license applicants, or licensed practitioners before the agency.[3] Those cases do not support the proposition that any agency may enjoin non-licensees and others not explicitly subject to agency jurisdiction to effectuate its goals without going through judicial procedures.

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[2] *Bruhn's Freezer Meats of Chicago Inc., v. U.S. Department of Agriculture,* 438 F.2d 1332 (8th Cir. 1970); *Sebastopol Meat Co. v. Secretary of Agriculture,* 440 F.2d, 983 (9th Cir. 1921); *Guziak v. F.T.C.*, 361 F.2d, 700 (8th Cir. 1966), cert. den., 385 U.S. 1007 (1967); *F.T.C. v. Standard Education Society,* 302 U.S. 112 (1937); *Mattes v. U.S.*, 721 F.2d 1125 (7th Cir. 1983).

[3] *American Trucking Ass'n v. U.S.*, 344 U.S. 298 (1953); *Amoskeog v. I.C.C.*, 590 F.2d 388 (1st Cir. 1979); *I.C.C. v. American Trucking Assn's.*, 467 U.S. 354 (1984); *U.S. v. Chesapeake & Ohio R. Co.*, 426 U.S. 500 (1976); *Trans Alaska Pipeline Cases,* 436 U.S. 631 (1978); *Mattes v. U.S.*, 721 F.2d 1125 (7th Cir. 1983) concerned a sanction of an applicant for a license and, as well, a statute providing for agency sanction authority over "all persons."

Third, the Third Circuit relied on a statutory provision, 49 U.S. Code Sec. 10321, authorizing the Interstate Commerce Commission to conduct *investigations* of all persons. As noted heretofore, the authority to investigate does not imply the more significant authority to sanction. The Commission itself does not express confidence in this rationale.[4]

Finally, the Third Circuit relied on general language found in all enabling legislation for agencies, such as 49 U.S. Code 10321. However, the Third Circuit's interpretation of the scope of 49 U.S. Code Sec. 10321 conflicts with the decisions of other circuits which have repeatedly, and uniformly, rejected the suggestion by the Commission that general language authorizing that agency to effectuate national policy, 49 U.S. Code Sec. 10321, is the basis for supporting any implied sanction authority.[5]

Neither the Third Circuit decision nor the Commission reply brief to this Court has cited a single case in which an agency with no explicit sanction authority from Congress over "all persons" has been held to have implied authority to sanction non-licensed individuals.

The Third Circuit's determination, that all agencies are impliedly authorized to sanction individuals to effectuate agency orders opens up a pandora's box. There are no safeguards, such as those which Congress has provided to licensees (including the two-notice, two-hearing provisions of the Interstate Commerce Act 49 U.S. Code Sec. 10925); there are no guidelines on the scope and duration of the sanctions; and there is no Congressional input on these matters. Such a result is clearly inconsistent with the several admonitions issued by Congress in passing the Motor Carrier Act of 1980 such as that

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[4]It stated in its reply to this Court, "Even if the foregoing provisions do not expressly confer authority on the I.C.C. to enter a debarment order when necessary to effectuate a decision to revoke an operating license, the Commission has implied authority to enter such an order." (p. 12)

[5]*Global Van Lines v. I.C.C.*, 714 F.2d 1290, 1295 (5th Cir. 1983); *Central & So. Motor Freight v. I.C.C.*, 582 F.2d 113, 118 (1st Cir. 1978); and *Central Forwarding Inc. v. I.C.C.*, 698 F.2d 1266 (5th Cir. 1983).

". . . the Interstate Commerce Commission should not attempt to go beyond the powers vested in it by the Interstate Commerce Act and other legislation enacted by Congress. . . ." *Sec.* 3(a) Pub.L. 96-296,

and

". . . the Commission is admonished to stay within the powers specifically vested in it by the revised law." *H.R. Rep. No. 1069, 96 Cong., 2d Sess. 10-11,* reprinted in 1980 U.S. Code Cong. & Av. News, 2283, 2292-93.

c) The Commission's Sanction Authority Over Non-Licensees Has Been Revoked.

The Commission's brief in opposition has misinterpreted and misreported the explicit revocation by Congress of sanction authority in prior law Section 42. Therein, Congress revoked any sanction authority over non-licensed individuals the Commission may have had. Contrary to the statement and partial quote in the Commission's reply brief, the amendments of 1978, in which prior law Section 42 was removed, was not simply a restatement or re-enactment of all prior substantive law. The characterization by the Commission of the 1978 legislation is inaccurate. Thus the Commission errs in stating (p.13 n.8) that the 1978 amendment merely was:

"designed to 're-state, without substance of change,' the laws previously in force."

Rather, Congress stated in the 1978 amendments that only those laws that were "replaced" were to be construed as not having been substantively changed. *Sec. 3 Pub.L. 95-473,* October 17, 1978, 92 Stat 1466, (a). To that end Congress enacted several tables of laws to indicate the status of prior laws: a) those provisions that were subsequently re-enacted; b) that provisions that were omitted but not repealed; and c) those provisions that were omitted and repealed. Section 42 is found in Table II which contained the provision that were both omitted *and repealed.*

In repealing prior law Section 42 Congress directed the Commission thereafter to go to court, under the Federal Rules of Civil Procedure, to seek sanctions against non-licensees.[6] It also gave the Commission immediate access to the courts for injunctions or other sanctions over non-licensed individuals which the Commission felt were necessary, in 49 U.S. Code Sec. 11702, 11703, 11901 and 11906. Accordingly, whatever tenuous argument the Commission might have adduced prior to the amendments for authority to sanction non-licensees was rebutted by the repeal of Section 42.

d) The Claim Of Implied Sanction Powers is Inconsistent With The Explicit Sanction Powers Granted by Congress

Moreover, other portions of the Interstate Commerce Act are inconsistent with the notion of implied sanction authority in the Commission over non-licensees. If Congress had intended to provide the Commission with sanction authority over all non-licensed individuals in 49 U.S. Code Sec. 10321, it would not have felt it necessary to authorize subsequently explicit sanction jurisdiction over specific classes of non-licensed individuals. *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980). Yet, in the 1986 amendments, 49 U.S. Code Sec. 11701, Congress gave the Commission sanction powers over the now non-licensed freight forwarders; and in the 1980 amendments to 49 U.S. Code Sec. 10934, Congress gave the Commission sanction powers over household goods movers agents who were not, and had never been, licensees.

e) The Decision Below Has Far Reaching and Dangerous Potential

To permit, as the decision below does, governmental agencies to have implied sanction authority is a dangerous precedent. It impinges on the civil liberties of all citizens and creates a potential for changing the relationship between governmental agencies which are an arm of the legislature and the judiciary. If all agencies may now sanction any individual without statutory limitations and safeguards whenever they deem it necessary to

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[6]The Federal Rules of Civil Procedure are not made applicable to Commission proceedings, they apply to Courts only. See FRCP Rules 1 and 81.

make their orders effective or more effective, the potential for suspension of protections and standards is great.

f) This Case Is Ripe For Review

The Commission suggests that, while it may not have sanction authority over non-licensed individuals, at least in *this* case its order should not be reversed. In its brief in opposition it suggests, (p. 14), that should "the issue arise more frequently, there is time enough for this Court to consider the issue presented after it has been more thoroughly deliberated in the Courts of Appeal." There are two errors in this approach. First, the suggestion ignores *petitioner's* right to have the law applied in *this* case. There is no measure of error that permits the agency to continue to issue sanctions beyond its jurisdiction for a period of time until the number of individuals sanctioned meets a particular quantum. The argument that this Court should await further abuse by administrative agencies before taking action makes no sense.

Secondly, since its decision in the Zola/Natco proceeding, the Commission itself has already utilized the Third Circuit's decision here on review to further expand its implied sanction power over other non-licensees. See: *M. Bulifant Trucking Inc.*, 1990 Fed. Carrier Cases Par. 37,783, p. 47,071, set forth in petitioner's supplemental brief. The dangerous precedent of the decision below will also be attractive to other agencies seeking to expand their authority without the necessity of obtaining congressional authorization.

III

MR. ZOLA HAS BEEN ACCUSED AND FOUND GUILTY IN A PROCEEDING IN WHICH HE WAS NOT A PARTY.

The Commission acknowledges that there was no notice to Mr. Zola in the AAACon proceeding (to which he was not a party) that his rights and status would be determined. See: 15a, and brief in opposition p. 11, n.6.

The Commission's rationale, adopted by the Court below, is that petitioner Zola had notice in the subsequent Natco proceeding that he was being charged with being the alter ego of AAACon. The defect in this reasoning is that in the Natco proceeding there was not a scintilla of evidence that Mr. Zola was

the alter ego of AAACon. Rather, as the Commission acknowledged, it relied exclusively on its findings in the earlier AAACon case that Mr. Zola was the alter ego of AAACon (15a).

While the Third Circuit stated that there was evidence "in the record," it erred in failing to observe that the evidence was not in the record *in the case before it,* as the Commission decision acknowledged (31a). The concept is that petitioner Zola was told in the Natco proceedings, commenced in 1986, that he was then bound by the Commission's findings in the AAACon proceedings, which had closed in 1984, is unconstitutional. It denies petitioner Zola due process. It is also inconsistent with the teachings of this Court in *Zenith Radio Corp. v. Hazeltine Research,* 395 U.S. 100 (1969); *Martin v. Wilks,* 109 S.Ct. 2180 (1989); and *Regents of Georgia v. Carroll,* 338 U.S. 586 (1949). A person may not have his status determined in a proceeding in which he is not a party in violation of the constitutional requirement that parties be notified when they are being charged with wrongdoing.' Cf. *In Re Ruffalo,* 390 U.S. 544 (1968).

IV

A REVOCATION ORDER IS NOT AN INJUNCTION

Petitioner has been charged with wrongdoing in failing to go out of the automobile transport business after AAACon's license was revoked. That revocation did not contain any injunctive language. It did not order anyone to do anything. The language of the revocation order is "AAACon's license is . . . revoked." The Commission's reply brief does not challenge the law that injunctions must be clear on their face and may not be implied *International Longshoreman's Assoc. v. Marine Trade*

'As to the Commission's new claim in its responsive brief that Mr. Zola himself may have been a carrier, this was not a finding made by the court below. It was not alleged in the Zola/Natco proceedings by the Commission nor has Mr. Zola been accused of operating as a carrier without a license. Indeed, if Mr. Zola were a carrier, he would be entitled to the two-notice, two-hearing provisions all carriers are entitled to under 49 U.S. Code Sec. 10925, but which the Commission felt unnecessary to provide him with inasmuch as it declared him to be the "alter ego of AAACon" in the earlier AAACon case.

Assoc., 389 U.S. 64, 76 (1967), nor does it defend that Third Circuit's finding that the AAACon revocation contained an "implied" injunction, (20a), which impliedly enjoined petitioner Zola.

Injunctions must be clear on their face so that persons know what is required of them and what is prohibited. The revocation of a corporation's license does not contain or imply injunctive language. *Regents of Georgia v. Carroll,* 338 U.S. 586 (1949); *Sea Island Broadcasting Corp. v. F.C.C.*, 627 F.2d 240 (2d Cir. (1980) cert. den. 101 S. Ct. 105. To find, as the Third Circuit does, that it impliedly directed petitioner Zola not to purchase the stock of another carrier, or to conduct operations (however free of anti-consumer activity they may have been) is nowhere to be found.

Revocation of licenses cannot be expanded to injunctions. The agency must make any injunctive order it issues clear and specific. It failed to do so in the AAACon case and it may not sanction Mr. Zola subsequently for what it intended to include in the AAACon order, but did not. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters,* 415 U.S. 423 (1974).

Respectfully submitted,

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